92-54

No. ——

Supreme Court, U.S.
FILED
JUN 29 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DESOTO COUNTY BOARD OF SUPERVISORS, WILL RENFRO, FLOYD ROBERTSON, JOHNNY WALLACE, JAMES EARL RILEY AND EULO LOYD,
Petitioners

v.

NORTH MISSISSIPPI COMMUNICATIONS, INC., PAMELA MCPHAIL IVY AND CHARLES M. IVY,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the panel opinion of the Fifth Circuit Court of Appeals, which failed to take into account cases involving political patronage in the context of an independent contractor, and which, as a consequence, expands *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) beyond their express limitation to government employees and thereby conflicts with every other circuit which has addressed the issue, should be vacated and the judgment of the district court affirmed.

2. Whether the law of the case doctrine should bar consideration of this purely legal issue where application of the doctrine would result in manifest injustice and clear error.

PARTIES TO THE PROCEEDING

All parties to this proceeding in the Fifth Circuit Court of Appeals whose judgment is sought to be reviewed are:

Petitioners:

The DeSoto County Board of Supervisors
Will Renfro
Floyd Robertson
Johnny Wallace
James Earl Riley
Eulo Loyd

Respondents:

North Mississippi Communications, Inc.
Pamela McPhail Ivy

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Petitioners

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The first opinion of the Fifth Circuit Court of Appeals is reported at 792 F.2d 1330. The second opinion may be found at 874 F.2d 1064, and the third opinion of the Court of Appeals may be found at 951 F.2d 652.

The only published opinion of the United States District Court for the Northern District of Mississippi appears

at 681 F.Supp. 1185. All published opinions and two unpublished opinions of the District Court are contained in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit which Petitioners seek to have reviewed was entered January 28, 1992. On March 28, 1992, Petitioners' Suggestion for Rehearing en banc was denied. The Petitioners respectfully invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usages, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioners are the Board of Supervisors of DeSoto County, Mississippi, and individual county supervisors Will Renfro, Floyd Robertson, Johnny Wallace, James Earl Riley and Eulo Loyd (hereinafter collectively referred to as "Board"). The Respondents are North Mississippi Communications, Inc. (owner of the newspaper, the *North Mississippi Times*) and Pamela McPhail Ivy (hereinafter collectively referred to as "NMCI"). The case originated with a multi-count Complaint alleging antitrust conspiracy charges against multiple unrelated Defendants and a claim against the Board under 42 U.S.C. § 1983. The § 1983 claim was predicated on NMCI allegations that the Board had violated the first amendment by withholding county advertising [1] from the *North Mississippi Times* (hereinafter referred to as the "*Times*"), placing it instead in the *Olive Branch Tribune* (hereinafter referred to as the "*Tribune*"), a competing newspaper, in retaliation for unfavorable articles and editorials published by the *Times* about the Board.[2] At

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[1] Two (2) distinct types of publications are involved. Under Mississippi statutory law, the Board of Supervisors was required to publish board proceedings once a month in a newspaper of "general circulation." In addition, in order to comply with various state and federal legal notice requirements, the county had to publish legal notices or advertisements, (Transcript of August 27, 1988 Defendant's Case-in-Chief [1988 Tr.] 119-20), but it was not bound by the requirement that such notices be published in any particular newspaper. *Miss. Code Ann.* § 13-3-31 and *Miss. Code Ann.* § 19-3-33 (1972).

[2] The competition between the *Times* and *Tribune* was inimical. In 1976 the *Times* had been unsuccessful in a state court lawsuit

the conclusion of the NMCI proof, the district court granted a motion for directed verdict on all claims for all Defendants. On appeal the Fifth Circuit affirmed the dismissal of all claims except the § 1983 claim against the Board. *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986) (*NMCI I*). The case was remanded for further findings on the § 1983 claim and, if necessary, further trial of the case. *Id.*

After remand, the district court denied the Board's Motion to Dismiss the § 1983 claim, and on August 27, 1987, the trial continued with the presentation of testimony from the Board relating to the § 1983 claim. The district court issued a Memorandum Opinion and Order on March 8, 1988, finding that NMCI failed to meet its burden of proof and dismissing the § 1983 claim. *North Mississippi Communications, Inc. v. Jones*, 681 F.Supp. 1185 (N.D. Miss. 1988). On the second appeal, NMCI for the first time invoked *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064, 1067 (5th Cir. 1989) (*NMCI II*). Again, the case was reversed and remanded with instructions that the district court apply *Mt. Healthy.*

Without taking further proof, the district court issued a Memorandum Opinion and Order on June 25, 1990.

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against the *Tribune* seeking to prevent the *Tribune* from publishing any county legal advertisements. Subsequently, both papers competed for the right to publish Board proceedings. In both 1976 and 1978 the *Times* and *Tribune* bid for the right to publish Board proceedings with the *Times* being awarded the contract. However, the *Times* refused in both 1976 and 1978 to publish any Board proceedings when it did not receive the county's discretionary legal advertising. In fact, Pamela Ivy advised the Board in a 1978 letter that "The *Times* will not bid in the future on any legal notices under the present Board or its attorney. . . ." ([1988 Tr.] 213-15). Ivy even suggested the county board proceedings should go to the *Tribune*. The Board requested that Ms. Ivy provide an explanation of the statements made in the *Times* termination letter; however, the *Times* never responded.

Although reluctant to do so in a non-employment context, the district court nevertheless applied *Mt. Healthy* and found that "the evidence preponderates that the placing of the bulk of its advertising with the *Tribune* was due to acts of the *Times* and its editor which had nothing to do with a retaliation for the expressing of First Amendment rights." *North Mississippi Communications, Inc. v. Jones*, No. DC81-220-B-O (N.D. Miss. June 25, 1990) (*NMCI III*).

On January 28, 1992, a Fifth Circuit panel again reversed the district court's dismissal of the § 1983 claim, remanding and instructing the district court to determine whether the Board had established by a preponderance of the evidence that each and every one of 252 advertisements [3] would have been awarded to the *Tribune* regardless of the *Times*' protected conduct; if, not, the district court was directed to determine which advertisements were withheld for impermissible reasons, and to assess damages and attorneys' fees. *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992) (*NMCI IV*).

Subsequent to *NMCI IV*, the Board filed a Suggestion for Rehearing *en banc* asserting that the Fifth Circuit had twice applied an erroneous standard of law. The Board argued that the correct legal standard was to be found not in *Mt. Healthy*, but in *Elrod v. Burns*, 427 U.S. 347, *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990). The Board urged the Fifth Circuit to follow the Seventh Circuit's holding in *Lafalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) and hold that independent contractors, such as NMCI, were not entitled to the protection allowed public employees by virtue of *Elrod/Branti/*

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[3] At trial, the evidence established that during the period from February, 1976 until September, 1981 the *Times* received 168 legal advertisements from DeSoto County. The totals of advertisements for each paper include the advertising from the Board.

Rutan. The Fifth Circuit denied the Suggestion for Rehearing.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FAILED TO TAKE INTO ACCOUNT THE SUBSTANTIAL BODY OF LAW REGARDING INDEPENDENT CONTRACTORS IN A POLITICAL PATRONAGE CONTEXT, THEREBY EXTENDING *ELROD/BRANTI/RUTAN* BEYOND THEIR EXPRESS LIMITATIONS AND CAUSING A CONFLICT WITH EVERY OTHER COURT WHICH HAS ADDRESSED THE ISSUE.

Every decision in this case by the Fifth Circuit and by the district court has been made by reference to an erroneous legal standard drawn from incorrect precedent. Contrary to the assumption made by the district court in its original opinion and in every opinion issued by either court since that time, NMCI has not, when the appropriate legal standard is applied to the facts of this case, made out a prima facie case of deprivation of a right protected by the First Amendment of the United States Constitution. Because application of an incorrect legal standard (a "purely legal question" [4]) will "result in a miscarriage of justice," [5] the Fifth Circuit's opinion in *NMCI III* should be reversed and the district court's judgment dismissing this case should be affirmed.

As acknowledged by the Fifth Circuit panel in *NMCI II*, this case involves allegations of "the withholding of public patronage by a government entity in retaliation for critical media coverage of the government entity's conduct." *NMCI II*, 874 F.2d at 1068. In spite of that recognition, however, no court has ever examined the NMCI's claims in this case in light of the widely-established line of cases dealing with claims of First Amendment violations in the face of political patronage.

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[4] *NMCI IV*, 951 F.2d at 654.

[5] *NMCI II*, 874 F.2d at 1065.

The proper starting point for an examination of NMCI's claim is the trio of cases addressing employment decisions based upon political patronage.[6] *Elrod v. Burns*, the first of these cases, established that a non-policymaking, nonconfidential government employee may not be dismissed soleiy on the basis of his political beliefs or affiliations. See 427 U.S. at 373 (plurality opinion); 427 U.S. at 374 (Stewart, J., concurring). *Elrod* was followed by *Branti*, which reaffirmed *Elrod* and held that

> . . . the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. Finally, the recently decided *Rutan* expanded *Elrod/Branti* to include promotions, transfers and recalls after layoffs of public employees. 110 S.Ct. 2737. The decisions in each of these cases was specifically restricted by the Court to political patronage as it affects public employees only. The Court has repeatedly restricted the principle to public employees, declining to apply a broader brush.[7]

The important point for purposes of this Petition is that other than the Fifth Circuit no court which has ever been "asked to hold that the First Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, forbids a [political jurisdiction] to use political criteria in awarding public contracts," [8] has elected to do so. The notion has been roundly rejected by

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[6] *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Elrod v. Burns*, 427 U.S. 347 (1976).

[7] *See Elrod*, 427 U.S. at 353; *Branti*, 445 U.S. at 513 n.7; *Rutan*, 110 S.Ct. at 2733.

[8] *LaFalce v. Houston*, 712 F.2d 292, 293 (7th Cir. 1983).

the Third, Sixth, Seventh and Eighth Circuits.[9] There is no allegation in this case that NMCI was an employee of DeSoto County. Rather, NMCI fell into the category of independent contractor which desired to do business with the county.[10]

In the leading case rejecting an extension of *Elrod/Branti* to independent contractors, Judge Posner of the Seventh Circuit candidly stated:

> The practice of favoring political supporters in awarding contracts for public projects has a long

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[9] *Downtown Auto Parts, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 604 (1991) (lessee of city parking lots; post-*Rutan* decision declining to extend *Elrod/Branti/Rutan* to independent contractors); *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 111 S.Ct. 129 (1990) (security services contractor; court follows *LaFalce* noting "a cognizable distinction between the First Amendment associational interest of 'independent contractors' and 'public employees' in [the political patronage] context"); *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *modified on other grounds*, 924 F.2d 627 (1991) (*en banc*), *cert. denied*, 111 S.Ct. 2889, (1991) (contract to operate state golf course; court notes post-*Rutan* that the Supreme Court has not extended *Elrod/Branti/Rutan* to the area of public contracts); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (New Jersey motor vehicle agents were independent contractors and thus not insulated by the First Amendment from being replaced on political patronage grounds); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (rejecting First Amendment claims of low bidding sign company to install and maintain benches along city streets); *Fox & Company v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982) (city auditors were independent contractors rather than employees); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) (state motor vehicle license and tax fee agents were independent contractors and thus not entitled to the First Amendment protections afforded public employees).

[10] To be sure, the Plaintiff in this case does publish a newspaper. This fact, however, should not distinguish the county's decision to do business or not with the Plaintiff from the case presented by any other independent contractor, whether it be a janitorial service, a supplier of office equipment, or any other business entity. The rights are the same no matter what the business of the independent contractor may be.

> history at the federal and particularly state and local levels. That it could interfere with the free expression of political views whether directly or through its effect on campaign contributions is hardly open to question. But before we can decide whether the practice is therefore unconstitutional, we must consider both the extent of the likely interference and the consequences of trying to prevent it through an interpretation of the Constitution.

LaFalce v. Houston, 712 F.2d at 293-94 [citations omitted]. After examining the interests of independent contractors, Judge Posner concluded that the asserted First Amendment interests were attenuated at best, and that extension of *Elrod/Branti* "would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.* at 294. The court then concluded:

> Someday the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough inferences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so.

Id. at 295. This sentiment has been echoed without contradiction in subsequent opinions by other circuits.[11]

Without reference to political patronage cases, the Fifth Circuit in *NMCI I* held that under *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), a decision by the Board of Supervisors to withhold advertising from the *Times* in retaliation for its criticisms of the board violated NMCI's First Amendment rights even though the *Times* had no "right" to receive advertising from the county in the first instance.[12] Thus, the court based its conclusion that NMCI had stated a claim upon a legal analysis drawn

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[11] *See, e.g., Horn v. Kean*, 796 F.2d at 677; *Lundblad v. Celeste*, 924 F.2d at 628.

[12] *NMCI I*, 792 F.2d at 1337.

from incorrect precedent. Thi serror was perpetuated in each succeeding decision by each court in this case.

In *NMCI II* the Fifth Circuit panel applied *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which requires employment of a two-part test:

> [T]he plaintiff must first show by a preponderance of the evidence that its conduct was constitutionally protected and that his conduct was a substantial or motivating factor in the defendant's decision. If the plaintiff carries that burden then the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision ever in the absence of the protected conduct.[13]

The panel then assumed, again without reference to political patronage cases, that NMCI had established a *prima facie* case of constitutional impingement. Thus, the Fifth Circuit was concerned only with the burden-shifting aspects of *Mt. Healthy* and never applied the proper analysis to determine whether NMCI had, as a matter of law, actually demonstrated an impingement of a constitutional right in the first instance. If the question is properly examined, *i.e.*, in light of the political patronage cases, then whether or not *Mt. Healthy* is appropriately invoked in this setting[14] becomes irrelevant—NMCI simply has not demonstrated a constitutional violation.

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[13] *NMCI II*, 874 F.2d at 1067.

[14] An onerous and unwieldy proposition in itself. *Mt. Healthy* has been roundly criticized by commentators, even when limited to cases involving employment decisions. *See, e.g.*, E. Gordon Gee, *Teacher Dismissal: A View from Mount Healthy*, 1980 B.Y.U. L. Rev. 255; Morell E. Mullins, *The Creeping Eruption of Mt. Healthy*, 1983 Det. C. L. Rev. 603; Talmadge M. Watts, *Abston v. Woodward: Can the Nonrenewal of Nontenured Teachers by Local School Boards Pass the Mt. Healthy Test?* 36 Ala. L. Rev. 355 (1984); Michael S. Wolly, *What Hath Mt. Healthy Wrought?* 41 Ohio St. L. J. 385 (1980). A situation involving one discrete employment decision differs radically from the instant case, where the Fifth

In failing to examine this case in light of the independent contractor progeny of *Elrod/Branti/Rutan*, the Fifth Circuit *sub silentio* expanded those decisions beyond their own self-imposed limitation to public employees and into the area of independent contractors—a course which has been forcefully rejected by every other federal court which has been faced with the issue.[15]

II. THE LAW OF THE CASE DOCTRINE DOES NOT PROHIBIT CONSIDERATION OF PETITIONERS' ARGUMENT.

The law of the case doctrine generally commands that neither the district court on remand nor the appellate court on subsequent appeal may deviate from the appellate court's mandate. *Arizona v. California*, 460 U.S. 605, 608 (1983). The doctrine is not inviolable, however, and the courts have recognized three exceptions to it.[16]

In this case the prior Fifth Circuit and district court decisions have been made by reference to an improper legal standard drawn from an incorrect precedent, a course which is clearly erroneous and would work a manifest injustice. Because of this error the law of the case doctrine should not be applied. *Arizona v. California*, 460 U.S. at 608 n.8. In the past the doctrine has been waived for "the most cogent of reasons and to avoid manifest injustice." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974).

Circuit has insisted that the Board offer proof as to the motives for *each* of 252 advertisements placed in the *Tribune* instead of the *Times*.

[15] See note 6, *supra*.

[16] The three exceptions are: (1) subsequent trial produces substantially different evidence; (2) controlling authority has since made contrary decision of law applicable to that issue; or (3) the prior decision was clearly erroneous and would work a manifest injustice. *Schexnider v. McDermott Intern, Inc.*, 868 F.2d 717 (5th Cir. 1989) (citing *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)).

At the center of every decision in this case is the assumption—erroneous as a matter of law—that NMCI and Ivy have articulated and demonstrated that they are entitled to the same degree of First Amendment protection afforded public employees. In its second and third opinions remanding the case, the Fifth Circuit instructed the district court to apply *Mt. Healthy*, which arose in the context of a firing of a *public employee* in retaliation for exercise of his First Amendment rights. The single similarity between *Mt. Healthy* and the instant case is that First Amendment violations are claimed. Neither the independent contractor nor the patronage considerations are present in *Mt. Healthy*.[17] The differences between the cases, which are numerous, simply are too vast to justify unquestioned application of *Mt. Healthy* without a prior determination that NMCI and Ivy actually have a constitutionally protected claim under these circumstances.[18] Because of the dissimilarities in the facts of the two cases and the existence of precedential authority to the contrary, *Mt. Healthy* is wholly inappropriate to this matter.[19] The correct standard to be applied in this matter is found in the independent contractor cases decided in the wake of *Elrod/Branti/Rutan*.[20] To ignore this unanimous body of law is clear error.

The second prong of the law of the case exception requires that the error of the court work a manifest injus-

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[17] *See NMCI II*, 874 F.2d at 1068.

[18] Doyle was a public school teacher. North Mississippi Communications, Inc. is the parent company and owner of the *Times*. Doyle was a public employee. North Mississippi Communications, Inc. is a private corporation that contracted with the DeSoto County Board of Supervisors. Under the most strained of interpretations, the facts of this case cannot be construed as involving an employment relationship. Indeed, no such claim has ever been made by NMCI or Ivy.

[19] In fact, the Fifth Circuit itself acknowledged in *NMCI II* that it has applied *Mt. Healthy* almost exclusively in the employment context. *NMCI II*, 874 F.2d at 1068.

[20] See *supra* note 5, and accompanying text.

tice. The injustice of failure to apply the political patronage analysis is indeed manifest in this instance.

In *NMCI IV*, the Fifth Circuit noted that an issue raised for the first time on appeal can be considered if "it is a purely legal issue and the refusal to consider it would result in a miscarriage of justice."[21] Pointing out that "[the Fifth Circuit] in *NMCI II* saw no reason why *Mt. Healthy* should not be applied in this context,"[22] and that "the Board has not sufficiently convinced us that our prior decision results in manifest injustice,"[23] the court of appeals held that the district court's decision should be reversed as being in conflict with the mandate in *NMCI II*.[24] Just as the panel in *NMCI II* concluded that a "refusal to review the district court's decision in this case in the light of *Mt. Healthy* would result in a miscarriage of justice,"[25] a refusal now to review the entire history of this case in light of the unanimously contrary decisions of other circuits in cases involving First Amendment claims by independent contractors in a political setting would result in a grave miscarriage of justice against the Board. Accordingly, the law of the case doctrine is excepted and the Court is free to address the legal standard to be applied in this matter.

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[21] *NMCI IV*, 951 F.2d at 654 n.9 (citing *Matter of HECI Exploration Co.*, 862 F.2d 513, 518 & n.7 (5th Cir. 1988) and *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 537-38 (5th Cir. 1987)).

[22] *NMCI IV*, 951 F.2d at 654.

[23] *Id.* at 656.

[24] *NMCI IV*, 951 F.2d at 654.

[25] *NMCI II*, 874 F.2d at 1069.

CONCLUSION

For all of the foregoing reasons Petitioners respectfully request the Court to grant Petitioners' Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1601

NORTH MISSISSIPPI COMMUNICATIONS, INC.,
and PAMELA MCPHAIL IVY,
Plaintiffs-Appellants,

v.

DOUGLAS W. JONES,
Defendant,

DESOTO COUNTY BOARD OF SUPERVISOR,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

Jan. 28, 1992

David J. Cocke, C. William Denton, Borod & Kramer, Memphis, Tenn., for plaintiffs-appellants.

Robert J. Kelly, Ann H. Lamar, Hernando, Miss., for defendant-appellee.

Before BROWN, KING and GARWOOD, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This free-speech case comes before this court for the third time. It all started when the owners of the *North Mississippi Times* brought suit against the DeSoto County County Board, alleging that, in violation of the First Amendment, the Board withheld county advertising in retaliation for the *Times*' publication of negative stories about the Board. Because of this court's actions on earlier appeals, the sole issue now before this court is whether the district court properly applied *Mt. Healthy's* [1] burden-shifting analysis to the *Times* § 1983 claim.[2] We conclude that it did not. We reverse in favor of the *Times* and remand for further findings.

Because the long series of events leading up to this dispute have been thoroughly examined in this court's two earlier opinions, we see no need to recite them in detail yet another time.[3] Briefly, the *Times* is a weekly newspaper in DeSoto County, owned by North Mississippi Communications, Inc. The DeSoto County Board was responsible for awarding by bid the county's general legal advertising, which consisted of county board proceedings and legal notices. The advertising had gone largely to the *Times* before 1976. In 1976, both the *Times* and the *Olive Branch Tribune*, another much smaller, weekly county

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[1] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

[2] The *Times* initially alleged violations of sections 1 and 2 of the Sherman Act and state-law tort claims, as well as civil rights claims under 42 U.S.C. § 1983. The district court granted a directed verdict in favor of the Board and dismissed all of the *Times*' claims. In *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir.1986) (*NMCI I*), we affirmed the court's dismissal of the anti-trust claims and remanded for further findings with respect to the Times' § 1983 claim. The district court again found for the Board, and the *Times* appealed. On appeal, we remanded that the court review the *Times*' § 1983 claim in light of *Mt. Healthy*.

[3] *See* 792 F.2d 1330 (5th Cir.1986) (*NMCI I*); 874 F.2d 1064 (5th Cir.1989) (*NMCI II*).

newspaper, bid for the right to publish county advertising. For the first time, the Board required the newspapers to submit their circulation lists for review. Although the *Times* won the bid for publication of the Board proceedings, the Board determined that it would place legal notices in either paper at its discretion.[4]

The district court found that in 1976, the *Times* and *Tribune* received approximately the same number of legal notices. From mid-1977 forward, however, the evidence at trial clearly showed that the Board opted to give almost all its legal notice business to the *Tribune*. In 1977, the *Times* received 41 notices through June 30 and none thereafter; and the *Tribune* received 73 during the first half of 1977 and 113 in the second half. In 1978, the *Times* received only 14 legal notices, while the *Tribune* received 291.

It is undisputed that from 1975 forward, the *Times* published highly critical articles and letters about the Board's questionable activities. The *Times* claimed that the Board withheld county advertising in retaliation for the Board's negative publications in violation of the *Times*' First Amendment rights. Admittedly, the Board's placement of legal notices was discretionary. The *Times*, however, did not assert breach of contract, but instead a § 1983 constitutional violation. Indeed, the district court wholeheartedly agreed with the premise that if the Board withheld legal notice business in retaliation for the *Times*' publication of criminal articles, the Board has violated the *Times*' civil rights under the First Amendment.

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[4] Unhappy with this result, the *Times* brought a separate suit in April, 1976 in state court to enjoin the Board from publishing any county notices in the *Tribune*, alleging that the *Tribune* was not qualified to publish legal notices because of its small circulation. The *Times*' claim was rejected by the state court and no appeal of this decision was sought.

Round I: NMCI I

With respect to the *Times*' § 1983 claim, the district court found only that the Board's withholding of county legal advertisements did not threaten to put the *Times* out of business. On appeal, we held that this finding did not dispatch the *Times*' § 1983 claim and remanded this claim to the district court for further findings. Specifically, in *NMCI I*, we directed that the district court determine whether the Board denied some or all of its legal advertising to the *Times* in retaliation for the *Times*' critical news stories and editorials.[5] The court, without a jury, conducted a "second trial" [6] and again found in favor of the Board, concluding that "even though a prima facie case of a constitutional violation was presented in the plaintiff's case in chief, the rebuttal evidence of the Board was just as persuasive that other legitimate reasons existed for favoring the *Tribune* over the *Times*." [7] The court ultimately held: "There is a possibility that the Board wished to retaliate against the *Times* for its editorial positions . . . however, the court cannot say that the evidence preponderates toward that finding. The other reasons for favoring the *Tribune* heretofore described appear just as probable." [8]

If At First You Don't Succeed; Try, Try Again: NMCI II

The *Times* again appealed, claiming that the failure to apply the *Mt. Healthy* burden-shifting analysis to their § 1983 claim constituted reversible error. Because this claim involved a purely legal question, we justifiably

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[5] *NMCI I*, 792 F.2d at 1337.

[6] Since a directed verdict was awarded to the Board after the presentation of the *Times*' case in the first bench trial, the second trial began with the presentation of the Board's defense. The court heard oral arguments from both sides as well.

[7] *North Mississippi Communications, Inc. v. DeSoto County*, 681 F.Supp. 1185, 1188 (N.D.Miss.1988).

[8] *Id.* at 1189.

considered it in *NMCI II*, even though the *Times* had raised it for the first time on its second appeal.[9]

Mt. Healthy involved the alleged refusal to re-employ a public school teacher because of the teacher's exercise of his free-speech rights. This case gave birth to the two-step burden-shifting rule, which has now become standard fare in discrimination cases. The Supreme Court held that (i) the plaintiff must first show that his constitutionally protected conduct was a substantial or motivating factor in the defendant's decision; and (ii) if the plaintiff carries this burden, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the protected conduct.

We are keenly aware that *Mt. Healthy* has never before been applied to a set of facts involving the denial of public patronage. Nevertheless, this court in *NMCI II* saw no reason why *Mt. Healthy* should not be applied in this context and remanded this case to the district court for the second time for further findings as required by *Mt. Healthy*. We reject the district court's assessment that the application is a strained one. To the contrary, *Mt. Healthy's* rule is broad enough potentially to lend itself to a wide variety of fact patterns.

NMCI III

Upon remand, the district court, conscientiously, but reluctantly, heeding our mandate to apply the *Mt. Healthy* burden-shifting analysis, again held for the Board, asserting reasons why *Mt. Healthy* could not work here.[10] Without hearing any additional evidence the court

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[9] *See Matter of HECI Exploration Co.*, 862 F.2d 513, 518 & n. 7 (5th Cir.1988) and *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 537-38 (5th Cir.1987), for the proposition that an issue raised for the first time on appeal will not be considered unless it is a purely legal issue and the refusal to consider it would result in a miscarriage of justice.

[10] Both the Board and the trial judge exhaust much effort in attempting to persuade us that *Mr. Healthy's* burden-shifting rule

first held that the *Times* did not meet its burden under prong one of *Mt. Healthy*. Second, even assuming the *Times* satisfied *Mt. Healthy's* first prong, the court concluded that reasons other than retaliation motivated the Board to switch its advertising from the *Times* to the *Tribune*. We hold that the district court erred on both counts.

a. Mt. Healthy's First Prong

The district court found that the *Times*, under the first prong of *Mt. Healthy*, failed to show that retaliation was a motivating factor in the Board's denial of county business:

> [T]he placing of patronage business by the Board between two newspapers in the county was possibly a mixed motive act; however, the plaintiff has not proven by credible and probative evidence as it is required to do that the placing of some ads with the *Tribune* was the result of the *Times'* criticisms of the Board.[11]

Because this court in *NMCI II* previously determined that the *Times'* sufficiently proved that retaliation was a motivating factor, the district court's finding clearly disregards our previous mandate and thus violates the law of the case doctrine.

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simply will not work in this case. Appellee's Brief at 19-20. The district court urges that the rule is unique to cases involving termination of employment or refusal to rehire, arguing that these cases are "a one-time act for purposes of the *Mt. Healthy* analysis," that "the facts in this case involve literally dozens of acts stretching over a four to five year period," and further that "[t]o analyze each of the many decisions made as to which newspaper each ad would be placed in would rival some of the twelve Herculean labors." *North Mississippi*, No. DC81-220-B-O (N.D.Miss. June 25, 1990).

[11] *Id.* This finding by the district court seems to contradict its earlier conclusion following the second trial. There the district court held that a prima facie case of a constitutional violation was presented in the plaintiff's case in chief. *North Mississippi*, 681 F.Supp. at 1188.

In *NMCI II*, our primary concern was whether the application of the *Mt. Healthy* burden-shifting analysis was appropriate for this case. Although we recognized in *NMCI II* that the district court did not expressly find that the *Times* had proved retaliation was a motivating factor,[12] we also highlighted the fact that the lower court failed to find that retaliation was not a factor in the Board's decision.[13] Despite the absence of this finding by the district court, we nevertheless, in light of the evidence presented on timing, hostility and admissions relating to motivation for the Board's conduct,[14] went on to hold that any other conclusion would be clearly erroneous. We decided that the record evidence established the motivating factor inquiry; without this, there would be no occasion for us to remand in order to consider *Mt. Healthy*.

This court's ultimate *NMCI II* decision to remand to apply *Mt. Healthy* to this case necessarily carried with it the determination that, at the very least, this was a mixed-motives case and that the *Times* had satisfied its burden under prong one of *Mt. Healthy*. In other words, if we had not first found that the *Times* adequately proved that retaliation was a motivating factor, this

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[12] *NMCI II*, 874 F.2d at 1068.

[13] *Id.* at n. 1.

[14] *Id.* at 1068. As to hostility, in *North Mississippi*, 681 F.Supp. at 1188, the trial court found that some of the supervisors felt anger toward the editor of the *Times* for the highly critical stories and editorials published about them. Further, the court stated that "there is a possibility that the Board wished to retaliate against the *Times* for its editorial positions. Such a feeling certainly would not be surprising considering the circumstances, ..." *Id.* at 1189.

Second, the evidence with respect to timing showed that articles were published about the Board from 1975 forward. In 1976, the *Times* and *Tribune* received an equal share of the county business. Prior to this time, the *Times* received all of the business. From 1977 forward, the Board allocated approximately 72% of its business to the *Tribune* and only 28% to the *Times*.

court would have never instructed the lower court to apply *Mt. Healthy*.

The law of the case doctrine dictates that a prior decision of this court will be followed without re-examination both on the remand to the district court and on subsequent appeals to this court,[15] unless (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice.[16] Because of our previous holding in *NMCI II*, the district court's subsequent contrary finding violates the law of the case doctrine. None of the exceptions to the rule afford relief: (i) new or different evidence was not introduced, since the district court did not conduct a third trial; (ii) the Board has not cited, nor are we otherwise aware of, any decisions by other courts rejecting *Mt. Healthy* since our mandate in *NMCI II*; and (iii) the Board has not sufficiently convinced us that our prior decision results in manifest injustice. We therefore hold that the district courts' finding is contrary to our decision and violates the law of the case doctrine.

b. Second Prong of Mt. Healthy

Under our mandate, the burden shifted to the Board to show that it would have withdrawn its legal notice business from the *Times* even in the absence of the *Times*' unconstitutional retaliation. Because of its erroneous interpretation of *NMCI II*, the district court devoted little, if any, attention to the second question of whether the Board would have made the same decision to shift its business to the *Tribune* in the absence of the

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[15] *Dickinson v. Auto Ctr. Mfr. Co.*, 733 F.2d 1092, 1096 (5th Cir. 1983).

[16] *Schexnider v. McDermott Int'l, Inc.*, 868 F.2d 717, 718-19 (5th Cir.1989); *Dickinson*, at 1096 n. 3, (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir.1967)).

unconstitutional retaliation. The closest the district court came to finding that the Board met its burden was its following reasoning:

> It is clear that the Board proved in rebuttal that it would have given the *bulk* of its legal ads to the *Tribune* anyway, regardless of the protected conduct of the *Times*, because of the two broken bid agreements by the *Times* stating that no business from the county would be sought and suggesting the business should go to the *Tribune*. [Emphasis added.] [17]

We now give this question the close scrutiny it deserves. The district court's assessment that the Board "would have given the *bulk* of its legal ads to the *Tribune* anyway, regardless of the protected conduct of the *Times*" is not sufficient to satisfy *Mt. Healthy*. The district court implicitly determined that the Board need only show that a "bulk" of the legal notices would have been denied to the *Times* notwithstanding its constitutional retaliation. We disagree. *Mt. Healthy* instead requires that the Board prove that *none* of the county advertising was withheld from the *Times* in retaliation of its critical publications.

The Board complains that it cannot possibly "prove by a preponderance of the evidence that *each* of the 252 advertisements would have been awarded to the *Tribune* even in the absence of the criticisms of the *Times*," adopting the district court's view that "[s]uch a Herculean task would be an impossible burden to meet and be manifestly unjust." [18] Despite the potential difficulty of determining whether any of the 252 advertisements were denied to the *Times* on the basis of retaliation, we cannot escape the conclusion that the trial court's finding rests upon an erroneous view of *Mt. Healthy*. The Board's denial of publication of just one county legal

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[17] *North Mississippi*, No. DC81-220-B-O (N.D.Miss. June 25, 1990).

[18] Appellee's Brief at 19-20.

notice based upon the *Times*' unconstitutional retaliation constitutes a violation of the First Amendment.

We reiterate the United States Supreme Court's mandate that in a mixed-motives case, the defendant may not prevail "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision;" nor may it prevail "by merely showing that at the time of the decision it was motivated only in part by a legitimate reason." [19] The defendant is required to make this showing by a preponderance of the evidence.[20] The district court failed to apply this test to the award of each and every advertisement.

When a trial court has made a fact finding upon an erroneous view of the law, the factual determination loses all vitality, requiring a remand.[21] Because the *Times* is entitled to a determination of how many ads it lost due to the Board's unconstitutional retaliation (and the *Mount Healthy* burden is on the Board), we regretfully remand this case for the fourth time in order that the trial court find exactly which advertisements, if any, were the subject of the Board's retaliation.

Accordingly, we reverse and remand this case to the district court for the following limited purposes: 1) to find whether the Board established by a preponderance of the evidence that each and every ad would have been awarded to the Tribune regardless of the *Times*' protected conduct; if not, then to further find 2) the specific ads withheld as a result of the protected conduct; 3) damages with respect to the withheld advertising; and 4) reasonable attorneys' fees for the *Times*.

REVERSED and REMANDED.

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[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248, 109 S.Ct. 1775, 1789, 104 L.Ed.2d 268, 289 (1989).

[20] *Id.*

[21] *See Pullman-Standard v. Swint*, 456 U.S. 273, 291, 102 S.Ct. 1781, 1791, 72 L.Ed.2d 66, 81 (1982).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC81-220-B-O

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs

v.

DOUGLAS W. JONES, *et al.*,
Defendants

MEMORANDUM OPINION

After a bench trial in which the plaintiffs charged the defendants deprived them of their First Amendment rights while acting under color of state law in violation of 42 U.S.C. § 1983, this court dismissed the charges, holding that the plaintiffs failed to prove by a preponderance of the evidence that the actions of the defendants were in retaliation of the plaintiffs exercising their First Amendment rights. 681 F.Supp. 1185 (1988).

On appeal the appellate court ruled that the trial court should reexamine the case and apply the *Mt. Healthy* analysis to the facts of this case. 874 F.2d 1064 (5th Cir. 1989). The plaintiffs claim that the defendants withheld certain public patronage from the plaintiffs in the form of newspaper legal advertisements in retaliation of critical newspaper coverage of the defendants' actions as a county board of supervisors. The North Mississippi Times, hereinafter "the Times," is a weekly newspaper with its primary circulation in DeSoto County, Mississippi. The Times, its owner, and its editor charged that the members of the DeSoto County Board of Supervisors, hereinafter "the Board," switched much of the Board's

legal advertising to a fledgling newspaper in the county, the Tribune, and also threatened businessmen who advertised in the Times, threatening to withhold the county's business if those persons continued to advertise with the Times. The plaintiffs claim that the defendants' motive for these acts was retaliation to critical editorial and news policies of the Times relating to the Board. In 1975 the Times underwent a change in ownership and administration. After this change, the Times published articles and letters critical of the county Board. By state law the Board is required to publish in a newspaper of general circulation in the county the monthly proceedings of the Board and certain legal advertisements pertaining to purchases and other official acts. In 1976 both the Times and the fledgling Tribune bid for the right to publish the county board proceedings and the legal notices. The Times bid $0.00 for the publication of the Board proceedings and the two newspapers bid identical amounts to publish the Board's other legal notices. Consequently, the Board determined that it would place its legal notices in both papers as its discretion and the Times would get the publication of the Board's monthly proceedings.

Dissatisfied with this new competitive situation, the Times brought suit in state court seeking an injunction against the Board's giving any publication business to the Tribune, claiming that the smaller paper was insufficient in size to qualify to publish legal notices as required by law. The state court rejected the Times' charges on May 27, 1976 and ruled that the Board was free to place legal notices in either or both newspapers.

In the previous opinion of this court [1] the court made a finding that in 1976 the two newspapers received approximately equal numbers of legal notices; however, in 1977 and 1978 the Tribune received the bulk of the legal notices. In the first half of 1976, even though the Times

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[1] 681 F.Supp. 1185 (N.D. Miss. 1988).

was receiving approximately the same number of legal ads as was the Tribune, the Times evidently still was dissatisfied with the Board's patronage of its competitor and on August 6, 1976 notified the Board in writing that it was withdrawing its previously made and accepted offer to publish the Board proceedings and would no longer do so. For the remainder of 1976 and then in 1977 and 1978 the Tribune received the bulk of the legal notices. Again in 1979 the Times bid $0.00 to publish the Board's monthly proceedings and again went back on its agreement before the year had expired and suggested to the Board that the Board should send the business to the Tribune, which the Board quickly did.

In June, 1978 the editor of the Times wrote the Board that the Times would not again bid on any legal notices because the editor believed the Board was responsible for a scandalous letter about her and because she believed the Board had attempted to influence some of the Times' advertisers not to do business with the Times. From the date of the editor's letter to the Board, the Tribune received the bulk of the legal notices business of the county.

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), concerned the refusal to reemploy an untenured public school teacher. The teacher claimed that he had been rejected for exercising his free speech rights under the First Amendment. The district court found that the teacher's exercise of his First Amendment rights had been a substantial factor in the school board's decision not to rehire him. Although there were also other factors that would have justified a decision by the board not to rehire him, the district court nevertheless ordered that the teacher be reinstated with back pay. The court of appeals affirmed. The Supreme Court, in remanding, observed that "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an

employee in a better position as a result of the constitutionally protected conduct than he would have occupied had he done nothing." Consequently, the court devised a burden-shifting rule under which the plaintiff must first show by a preponderance of the evidence that his conduct was constitutionally protected and that his conduct was a substantial or motivating factor in the employer's decision. If the plaintiff carries that burden, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the protected conduct. The court vacated and remanded the case for a determination whether the Board of Education had shown by a preponderance of the evidence that it would have reached the same decision had not the teacher exercised his First Amendment rights.

The Fifth Circuit has not previously applied the *Mt. Healthy* burden-shifting analysis in the context of a withholding of public patronage by a government entity in retaliation for critical media coverage of the government entity's conduct. Neither party suggested to the trial court that the analysis should be made but the question was raised for the first time before the appellate court. It appears to this court that the analogy of *Mt. Healthy* to a withholding of public patronage case is a strained one. While an employment case involving a termination or refusal to rehire is a one-time act for purposes of the *Mt. Healthy* analysis, the facts in this case involve literally dozens of acts stretching over a four to five year period. To analyze each of the many decisions made as to which newspaper each ad would be placed in would rival some of the twelve Herculean labors. Another significant difference between the classical *Mt. Healthy* type case and the case at bar is that a termination case is a complete and total severance of the employment relationship, while in the withholding of public patronage such as existed in this case the defendant Board did not totally withdraw its patronage from the plaintiff news-

paper but began dividing its business from ad to ad between the plaintiff newspaper and the competing Tribune. Neither did the defendant board members decide themselves where each of these ads would be placed, rather the chancery clerk or staff members made many of the decisions.

In carrying out the holding of the appellant court and applying the *Mt. Healthy* analysis to this case, it is obvious that the Times was exercising its First Amendment rights in publishing articles and editorials critical of the elected members of the county Board of Supervisors. It is also evident that the Board members were upset with the theretofore friendly local newspaper when it began in 1975 to turn unfriendly. The court is of the opinion that the placing of patronage business by the Board between the two newspapers in the county was possibly a mixed motive act; however, the plaintiff has not proven by credible and probative evidence as it is required to do that the placing of some ads with the Tribune was the result of the Times' criticisms of the Board. To hold that the acts complained of were acts of retaliation would require reliance on suspicion and conjecture. Even though charged, not one advertiser with the Times testified that he had withheld advertising from the Times or even had been asked to do so. The mailing of the scandalous letter concerning the editor of the Times was proven to have taken place but there was no proof whatsoever pointing to who did it. In looking at the chronology of events, one can see that conduct by the Times justified by any analysis the Board's placing some if not all of its business with a more reliable county newspaper. During the first seven months of 1976, even after the news ownership and the critical articles had appeared, the Times and the Tribune shared about equally in the legal notices revenue from the Board. In August, 1976 the Times breached its own bid agreement made a few months earlier concerning the printing of the Board's monthly proceedings. A letter was written in 1978 to the

Board by the editor of the Times accusing the Board of slander and advising the Board that the Times would bid no more on legal notices and suggesting the Tribune should get the business. The bid agreement made in 1979 by the Times also was breached. In the face of such accusations and statements that no business would be sought by the Times, the evidence preponderates that the placing of the bulk of its advertising with the Tribune was due to acts of the Times and its editor which had nothing to do with a retaliation for the expressing of First Amendment rights. During the first seven months of 1976, even after critical articles had appeared, the Times shared equally with its competitor newspaper in county business; but the Times appears not to have wanted an equal amount of county business. Rather, it wanted all of the business. It sought a state court order to disqualify the Tribune from receiving any county business whatsoever. The burden undertaken by the Times has not been met and the evidence presented does not convince the court that the Board's decision to start dividing its legal ads business between the two local newspapers was for the purpose of retaliating against the Times.

Under the *Mt. Healthy* burden-shifting analysis, if the plaintiff proves the two elements of (1) constitutionally protected action and (2) the plaintiff's act resulted in the defendant's conduct, then the burden shifts to the defendant to prove that it would have made the same decision toward the plaintiff anyway, even in the absence of the protected conduct. Even if the evidence had convinced the court of these two elements requiring the burden to shift to the defendant Board, it is clear that the Board proved in rebuttal that it would have given the bulk of its legal ads to the Tribune anyway, regardless of the protected conduct of the Times, because of the two broken bid agreements by the Times and the letter from the editor of the Times stating that no busi-

ness from the county would be sought and suggesting the business should go to the Tribune.

For these reasons the section 1983 claim will also be dismissed and an order will be entered accordingly.

THIS, the 25th day of June, 1990.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC81-220-B-O

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs

v.

DOUGLAS W. JONES, *et al.*,
Defendants

ORDER

In accordance with the memorandum opinion this day issued, it is ORDERED:

That the plaintiffs' 42 U.S.C. § 1983 caim is DISMISSED with prejudice.

THIS, the 25th day of June, 1990.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-1262

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs-Appellants,

v.

DOUGLAS W. JONES, *et al.*,
Defendants,

DE SOTO COUNTY BOARD OF SUPERVISORS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

June 12, 1989

C. Wm. Denton, David J. Cocke, Memphis, Tenn., for plaintiffs-appellants.

Robert J. Kelly, Ann H. Lamar, Hernando, Miss., for defendants-appellees.

Before GOLDBERG, REAVLEY and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this first amendment civil rights case, the DeSoto County Board of Supervisors is alleged to have withheld

county advertising from a local paper in retaliation for the paper's publication of editorials and news stories critical of the board. The district court decided that the facts on each side weighed about evenly, and held that the plaintiffs had not carried their burden of proving their claim. We are asked to consider whether the burden shifting analysis set forward in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), should be applied in this case, and, since it was not raised below, whether the failure to apply that analysis would result in a miscarriage of justice. We hold that the *Mt. Healthy* burden-shifting analysis should be applied in the context of this case, vacate the judgment below, and remand for further proceedings.

I

The *North Mississippi Times* is a weekly newspaper with its primary circulation in DeSoto County, Mississippi. On December 31, 1981, North Mississippi Communications, Inc. ("NMCI"), the owner of the *Times*, Pam Ivy, the *Times*' editor, and Charles Ivy, a shareholder of NMCI, filed a complaint against the editor and publisher of the *DeSoto Tribune*, the DeSoto Board of Supervisors, and various Hernando Bank officials, alleging that they had conspired to drive the *Times* out of business in violation of the antitrust laws and the first amendment. By order of February 20, 1985, at the close of the plaintiffs' evidence, the district court granted the defendants a directed verdict on all claims.

When the plaintiffs appealed to this court, we affirmed the dismissal of the antitrust claims, but remanded the section 1983 claims for further proceedings. *See North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).

On remand, the section 1983 claims proceeded to bench trial. The trial actually began with presentation of the defense, since the plaintiffs' evidence had been heard

three years earlier in the first trial. After the court heard additional oral argument, it dismissed the section 1983 claim with prejudice. 681 F.Supp. 1185. From the judgment that followed the plaintiffs now appeal.

II

In 1975, a company controlled by Ross Franks, a DeSoto County attorney, purchased a controlling interest in North Mississippi Communications, Inc. ("NMCI"), the owner of the *Times*. Pam Ivy was hired as the paper's editor and was made a shareholder of NMCI.

Beginning in 1975, the *Times* published articles and letters about the questionable conduct of the DeSoto County Board of Supervisors. In 1976 both the *Times* and the *Olive Branch Tribune*, a second DeSoto County weekly newspaper with a much smaller circulation (later renamed the *DeSoto County Tribune*), both bid for the right to publish county board proceedings and legal notices. After an initial bidding process, for reasons not entirely clear from the record a rebidding process was held, with more elaborate procedures. Then, for the first time, the Board of Supervisors required that the bidders submit their circulation lists for review. The lists were to be broken down by supervisor district and mailing addresses. Pam Ivy testified that these requirements were contrived to harass her, because the circulation of the *Times* was much greater than that of the *Tribune* and the supervisor districts lists were difficult to formulate. The *Times* underbid the *Tribune* for publication of the board proceedings, bidding zero dollars, and made the same bid as the *Tribune* for legal notices. As a result of the bidding, the *Times* won the bid for publication of board proceedings, but the board determined that it would, at its discretion, place legal notices wherever it wished. According to Ivy, before this occasion, the board proceedings and legal notices had been a package deal, and it had been her impression that if the *Times* won the

bid on the board proceedings it would also win the better paying business of printing the legal notices.

In April 1976, the *Times* brought suit in state court to enjoin the Board of Supervisors from publishing any county notices in the *Tribune*, alleging that the *Tribune* did not have a large enough circulation to qualify for publishing legal notices. The state court rejected the *Times*' claim on May 27, 1976, ruling that the requirement of "general circulation" for the publication of legal notices did not relate to the number of subscribers, but rather to the general nature of the news content.

There was testimony at trial before the district court in 1985 that while the *Times* was considering appeal of the Chancellor's ruling, Ivy was visited by three board supervisors who attempted to persuade her not to appeal. She was told that an appeal would jeopardize the county's $2 million bond issue, which had been published in the *Tribune* and might then have to be readvertised. Ivy testified that the suggestion was made to her that the supervisors wished to publish the county's advertisements on controversial matters in the *Tribune* precisely because of its low circulation. She also testified that at the same meeting with supervisors Renfro, Riley and Wallace, she was told that if she avoided making difficulties, she would get her share of legal notices. Ivy did not appeal.

The district court found that in 1976 the *Times* and the *Tribune* received approximately the same number of legal notices. Ivy put on evidence, however, that in 1977 the Times had received forty-one notices through June 30 and none thereafter, while the *Tribune* received seventy-three in the first half of 1977 and one hundred thirteen more in the second half. In 1978, the *Times* received a total of fourteen legal notices; the *Tribune* received two hundred ninety-one. Both papers were qualified to run legal notices at all the times at issue. Ivy also provided testimony cataloging the articles and editorials published

by the *Times* in 1976 and 1977 that were critical of the board.

Ivy additionally testified that after she had sent her advertising representatives to every business in town, she received word that she should no longer send representatives to one of her commercial advertisers, a Mrs. Garrett, because Floyd Robertson, one of the board supervisors, had told Mrs. Garrett that if she advertised in the *Times* the board would no longer do county business with her. When Ivy confronted one of the supervisors, James Earl Riley, about the incident, he indicated to her that if she would "straighten up" he might be able to help her, but otherwise it would merely be her word against Robertson's.

The district court held that while there was "a possibility that the Board wished to retaliate against the *Times* for its editorial positions," "other reasons for favoring the Tribune" appeared "just as probable," and the plaintiffs had failed to show by a preponderance of the evidence that they had been deprived of their first amendment rights.

III

On appeal, the specific issues raised by the plaintiff are (1) whether the fact that the district court did not apply the *Mt. Healthy* burden-shifting analysis necessitates reversal of the court's order; and (2) whether the court's finding that the country's shift of county advertising from the *Times* to the *Tribune* was as likely to have been for legitimate business reasons as for any impermissible motivation, was clearly erroneous. Because we resolve the former issue in the appellants' favor, we need not reach the latter issue.

A.

At the outset we must address the threshold inquiry of whether the issue of the applicability of *Mt. Healthy* is properly before this court on appeal. *Mt. Healthy* was

not raised by either party before the district court or by the district court *sua sponte*, and has been mentioned for the first time on appeal.

Mt. Healthy, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), concerned the refusal to re-employ an untenured public school teacher. The teacher claimed that he had been rejected for exercising his free-speech rights under the first amendment. The district court found that the teacher's exercise of his first amendment rights had been a substantial factor in the school board's decision not to rehire him. Although there were also other factors that would have justified a decision by the board not to rehire him, the district court nevertheless ordered that the teacher be reinstated with back pay. The court of appeals affirmed. The Supreme Court, in remanding, observed that "a rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the constitutionally protected conduct than he would have occupied had he done nothing." Consequently, the Court devised a burden-shifting rule under which the plaintiff must first show by a preponderance of the evidence that his conduct was constitutionally protected and that his conduct was a substantial or motivating factor in the defendant's decision. If the plaintiff carries that burden, then the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the protected conduct. The Court vacated and remanded the case for a determination whether the board of education had shown by a preponderance of the evidence that it would have reached the same decision had not the teacher exercised his first amendment rights.

In *Matter of HECI Exploration Co.*, 862 F.2d 513, 518 & n. 7 (5th Cir.1988), we reiterated the principle we previously stated in *United States v. D.K.G. Appa-*

loosas, Inc., 829 F.2d 532, 537-38 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1270, 99 L.Ed.2d 481 (1988), that we will not address an issue raised for the first time on appeal unless it is a purely legal issue and our refusal to consider it would result in a miscarriage of justice.

Whether the *Mt. Healthy* analysis fashioned in the employment discharge context should be applicable as a substantive matter in the context of this case presents a purely legal question. This circuit has uniformly applied the *Mt. Healthy* test, but almost exclusively in retaliatory discharge cases. *See, e.g., Robinson v. Boyer*, 825 F.2d 64, 68 (5th Cir.1987); *Montgomery v. Trinity Independent School District*, 809 F.2d 1058, 1061 (5th Cir.1987); *Avery v. Homewood City Board of Education*, 674 F.2d 337, 340 (5th Cir.1982), *cert. denied*, 461 U.S. 943, 103 S.Ct. 2119, 77 L.Ed.2d 1300 (1983); *Lindsey v. Mississippi Research and Development Center*, 652 F.2d 488, 492 (5th Cir.1981); *cf. Dunham v. Brock*, 794 F.2d 1037, 1039-40 & n. 2 (5th Cir.1986) (declining to decide whether the *Mt. Healthy* burden shifting rule applies in retaliatory-discharge cases under the Energy Reorganization Act). We have not yet in this circuit applied the test in a context involving the withholding of public patronage by a government entity in retaliation for critical media coverage of the government entity's conduct. However, we see no reason why the *Mt. Healthy* test should not apply as a substantive matter to the distinct but analogous facts of this case.

The facts here parallel those of a retaliatory discharge from employment case, in the sense that it is alleged that the defendants refused to employ the plaintiffs to provide services in retaliation for their having exercised their constitutional rights. It is also clearly a mixed motive case because the defendants, while acknowledging that the plaintiffs engaged in constitutionally protected con-

duct, assert that there were other legitimate grounds that motivated them to provide less business to the *Times* than they had previously. It is true that the district court did not expressly find that the plaintiffs had proved that the exercise of their first amendment rights was a substantial motivating factor in the board of supervisors' denial of advertising to the *Times*. The court, however, had no opportunity to do so because none of the parties had suggested that the *Mt. Healthy* analysis applied. In any event, we would find any other conclusion clearly erroneous on the facts of this case in which such substantial evidence was presented in terms of timing, hostility, and even admissions that relate to motivation for the defendants' conduct. Indeed, we are persuaded that it is strongly suggested by the district court's observations on the evidence, e.g., that some of the supervisors were in fact hostile because of the editorials, that it thought of the case as one of mixed motives. Accordingly, we consider this to be a mixed-motives case in which the *Mt. Healthy* analysis is appropriate.[1]

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[1] We do not read the district court's opinion in the same way that Judge Reavley, in dissent, reads it. Although the district court made no explicit finding that the plaintiffs had shown that retaliation was a substantial motivating factor, the court also did *not* find that the plaintiffs had failed to prove that retaliation was a motivating factor.

The district court found only that it was "just as likely" that business reasons motivated the board, as that retaliation was its motive. The motivating factor inquiry, as described in *Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is whether, if the employer had been asked at the time of its decision what its reasons were, and gave a truthful response, *one* of those reasons would be the impermissible motive. —— U.S. at ——, 109 S.Ct. at 1789-91. This is enough to shift the burden of proof to the defendant. From the record we believe that the plaintiffs' evidence satisfied this inquiry. If we were convinced that the district court had made a finding of fact as the dissent notes, and that finding was supported by the evidence, then this would be a different case in our view as well.

B.

Having concluded that the issue of *Mt. Healthy's* applicability is one of law, and having held that the *Mt. Healthy* analysis is appropriate in the context of this case, we now must ask whether our refusal to review the district court's decision in this case in the light of *Mt. Healthy* would result in a miscarriage of justice. We believe that it would.

The district court in this case before us expressly noted that "the record shows the Times to have received the lesser amount of the county advertising business during the four years of the defendant Board's tenure—only approximately 25%." The court found that, "contrary to the testimony of some of the individual supervisors, some of the supervisors did feel anger toward the editor of the Times for the highly critical stories and editorials published about them." Although the district court stated that the plaintiffs had made out a prima facie case of a constitutional violation in their case in chief, it concluded that "the rebuttal evidence of the Board was *just as persuasive* that other legitimate reasons existed for favoring the Tribune over the Times" (emphasis added). It went on to note that the *Times'* notice to the board that it no longer would publish monthly board proceedings at no cost, as agreed, "*could* easily have been perceived by the Board as evidence of unreliability" which would "justify a caution and perhaps a preference by the Board," and stated that such a business experience "is *just as likely* a reason [for the board's placing more of its discretionary legal notices in the *Tribune* than in the *Times*] as the claim of the plaintiff that the Tribune was favored in order to punish the Times for its criticism of the Board" (emphasis added).

Under the *Mt. Healthy,* analysis, once a plaintiff has demonstrated that an impermissible motive played a motivating part in his adverse treatment, the burden shifts

to the defendant to prove by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. *See also Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (affirming the preponderance of the evidence standard in the Title VII context, against a challenge that the "clear and convincing evidence" standard should govern a defendant's burden of proof). It is plain from the district court opinion that no preponderance finding was ever made. The Supreme Court in *Price Waterhouse* recently stated in strong language that the mere assertion or demonstration that legitimate reasons existed for adverse action is not enough to satisfy the employer's burden of proof:

> [P]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made. . . . An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.

—— U.S. at ——, 109 S.Ct. at 1791 (citations omitted).

Viewing the record as a whole, we see little evidence that there was a direct connection between the *Times'* decisions in 1976 and 1978 to discontinue carrying the county board proceedings it had been publishing at no expense to the county, and the board's direction of the bulk of its legal notice business to the *Tribune*.

The plaintiffs' allegations are serious, and they have gone to great lengths to prove that DeSoto County officers have exercised their authority to put them out of business for exercising their constitutional rights. They have adduced significant and impressive evidence to support this contention. Yet the plaintiffs have never been given an opportunity to have the evidence reviewed under the

proper analysis, favorable to them, as set forth by the Supreme Court in *Mt. Healthy*. We believe that a miscarriage of justice would result from denying the plaintiffs such an opportunity since the district court obviously thought the case virtually balanced, and ruled for the defendants *not* because the evidence weighed in their favor, but because under the traditional burden of proof, the plaintiffs had not prevailed by a preponderance of the evidence. That such a view of the case may have worked an injustice is particularly true now that the Supreme Court has reaffirmed that the applicable burden of proof upon the defendant in a case such as this is preponderance of the evidence, a burden which the defendants in this case may not have satisfied. However, because we cannot tell from the district court's opinion what conclusion the court would have reached had it applied the *Mt. Healthy* analysis to the facts of this case, *see Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576, we remand this case to the district court for further findings consistent with *Mt. Healthy* and *Price Waterhouse*. In so doing, we pass no judgment on what the ultimate conclusion of the district court should be.

IV

For the foregoing reasons, the decision of the district court is vacated and the case is remanded for further procedings consistent with this opinion.

VACATED AND REMANDED.

REAVLEY, Circuit Judge, dissenting:

I read the district court to say that the plaintiffs failed to prove that retaliation for their exercise of First Amendment rights was a substantial motivating factor in the Board's denial of advertising. The majority reads the district court differently. This court should then call on the district judge upon remand to resolve this question first. Instead, we are contributing to the confusion by

telling the district judge that this is a mixed motives case.

If the district court finds, as I believe it has, that plaintiffs failed to prove by a preponderance of the evidence that retaliation was a substantial motivating factor in the Board's decision, that view of the record is warranted. To be sure, there is evidence that Board members dislike the editor of the newspaper, but the unreliability and lack of cooperation by the plaintiff newspaper gave the Board legitimate cause to publish more of its legal notices in the Tribune. I do not reach *Mount Healthy* because, under my view of the district court's findings, this is not a mixed motives case. I would affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC81-220-NB-O

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs

v.

DOUGLAS W. JONES, *et al.*,
Defendants

MEMORANDUM OPINION

[Filed Mar. 8, 1988]

This case involves a small county newspaper, once influential and potent in its county but later devitalized and enfeebled by a combination of people, circumstances, and institutions it had sought to influence in order to maintain its own position of dominance in the county. In its later days before it was taken over by new owners, the newspaper fired a broadside of canon fire at those it sought to hold legally accountable for its demise. Those receiving the fire were a fledgling newspaper from the other side of the county, a banking institution, the DeSoto County Board of Supervisors, and individual persons associated with the organization. The volley of charges included violations of antitrust laws, civil rights laws, and state laws of libel.

After a bench trial the court dismissed the charges at the close of the plaintiffs' case for failing to present sufficient evidence to justify the allegations charged. The

order of this court was affirmed by the appellate court [1] as to the dismissal of the antitrust and libel charges but the appellate court remanded the case back to the trial court for findings of fact on the claim brought against the DeSoto County Board of Supervisors under 42 U.S.C. § 1983. This court conducted a second trial and, after hearing testimony from the defendants in regard to the section 1983 claim and consideration of the briefs and memoranda submitted by the parties, the court is now rendering its findings of fact and conclusions of law. The only defendants now remaining are the Board of Supervisors of DeSoto County, Mississippi. Specifically, the plaintiff Times has alleged that the Board of Supervisors violated the Times' First Amendment rights by withholding newspaper advertising from the Times and giving it to its competitor, the Tribune, in retaliation of the Times publishing critical stories and editorials about the Board of Supervisors.

The plaintiff, North Mississippi Communications, Inc., was the owner of the North Mississippi Times newspaper, hereinafter referred to as the "Times," a weekly newspaper in DeSoto County. The DeSoto County Tribune, hereinafter referred to as the "Tribune," was another newspaper on the other side of the county but since its inception had been only a fledgling paper and never had sought to invade the area served by the Times or compete with the Times for the business of publishing county legal advertisements. When the fledgling Tribune began stretching its wings and submitted a bid to the county Board to publish county Board proceedings and legal advertisements, which are required by law to be published in a newspaper of the county, the Times did not take kindly to this attempted invasion of its heretofore exclusive domain and in April, 1976, brought suit in state court to enjoin the Board of Supervisors from publishing

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[1] *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986).

any county notices in the Tribune, claiming that the fledgling was too small to meet the qualifications required to publish county legal notices. The Times' claim was rejected by the state court and, for the first time, DeSoto County had two newspapers rather than only one competing for the county's business.

The county's legal notices consisted of two types which are required by law to be published—(1) the monthly Board proceedings and (2) the notices advertising for bids on county purchases and county contracts. The Board determined that only the monthly proceedings were required to be placed with the lowest bidding newspaper. The other notices, which were more desirable from a newspaper's point of view because there were more of them, could be placed with any qualified papers at the Board's discretion. Before the Tribune was ruled qualified to publish the notices, the Times was the only paper in the county qualified to publish the notices and so received them all. Then the Times found itself having to compete with the new force. The financial amounts involved in publishing these legal notices were rather insignificant in the overall scheme of things. For the five and a half years which are the subject of this suit, the total amount of the Board's legal ads published in both newspapers totaled only approximately $4,600.00 a year.

Rejected by the state court in its attempt to maintain a monopoly on the county legal notices, the Times nevertheless was undaunted in its determination to prevail on this issue. So when the time came for the county to receive bids to publish the monthly Board proceedings, the Times, through its editor, bid zero dollars ($0.00) to publish the monthly proceedings. The editor of the Times later stated that it was her impression at the time that if her newspaper received the business of publishing the monthly Board proceedings, it would also get the better paying business of printing the legal notices; however, her im-

pression was ill-founded. The Board decided it had the discretion to publish the legal notices in either of the two qualified papers regardless of who published the monthly Board proceedings and it began to grant this business to both papers. When the Times saw that its $0.00 bid on the Board proceedings was not going to result in the Times also getting all of the legal notices and the accompanying income, the Times notified the Board in writing on August 6, 1976 that it was withdrawing its agreement to print the Board's monthly proceedings and the Tribune could have the business. That notification was only a few months after the Times had agreed to make these publications.

The record shows that after the Tribune began successfully competing and receiving county business the personal relations between the members of the Board of Supervisors and the editor of the Times, already strained, rapidly deteriorated. The Times wrote castigating and critical articles and editorials about the Board and its members, as was its constitutional right to do. The record also shows that the Board began to allocate more of its legal notice business to the Tribune. In fiscal 1977, the amount of legal notice business was approximately equally divided between the Times and the fledgling Tribune. Again, in fiscal 1979, the Times attempted to secure the county's legal advertising business and again bid $0.00 to publish the monthly Board proceedings, but again after the Board accepted the bid of the Times to print the monthly Board proceedings, the Times withdrew its agreement and suggested that the Board give this business to the Tribune, which the Board quickly did.

At one point in 1978 a detestable and abhorrent letter was mailed to hundreds of persons in the county degrading and libeling the editor of the Times. The evidence shows that the names and addresses of the receivers of that despicable document were taken from a list of Times subscribers. The Board had asked the Times for such a

list sometime before the mailing of the letter, but no evidence was presented at trial to prove with specificity who was responsible for these libelous acts. Many people could have had access to the list, and there is no more evidence in the record to point to the Board than to other persons. Would that the plaintiff could prove the identity of the culprits. Punitive damages surely would lie.

After the scandalous letter was circulated, the editor of the Times on June 12 1978 again wrote the Board and stated that due to the scandalous letter and her belief that the Board had some responsibility for the mailing of it and also due to her belief that the Board had placed pressure on some of the Times' advertisers to stop advertising in the Times that ". . . [t]he Times will not bid in the future on any legal notices under the present board or its attorney. . . ." The court heard no evidence that the Board placed any persons under any pressure concerning advertising in the Times. In response to the Times' letter, the president of the Board wrote the editor of the Times asking her if "this mean[s] that the North Mississippi Times shall print no legal notices, whatsoever, that it receives from DeSoto County. . .?" The Times did not respond to the query of the Board. In fiscal 1978, the Tribune received nearly all of the legal notice business of DeSoto County—$4,496.66 out of a total of $4,947.47. The last two years of the defendant Board's terms shows that the Tribune received the vast majority of the county's legal notice business.

The charges by the Times and the question to be decided by the court is whether the switch in allocating most of the county's legal notices from the Times to the Tribune was done by the Board as a retaliation against the Times because of its printing critical stories and editorials about the Board, or whether it was done for other reasons. Clearly, the Board cannot legally punish a newspaper by withholding public advertising from it in retaliation for the newspaper's expressing its constitutional

right of free speech under the first amendment. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972). If the claims of the Times against the Board are proven by the preponderance of the evidence, then the Board is guilty of violating 42 U.S.C. § 1983 which prohibits any person, under color of state law, to subject "any citizen . . . to the deprivation of any rights . . . secured by the Constitution. . . ." Obviously, the record shows the Times to have received the lesser amount of the county advertising business during the four years of the defendant Board's tenure—only approximately 28% The court is of the opinion that, contrary to the testimony of some of the individual supervisors, some of the supervisors did feel anger toward the editor of the Times for the highly critical stories and editorials published about them; however, the question at issue is what was the intent of the Board in allocating a greater share of the county advertising business to the Tribune than to the Times. Was it as a retaliation for the harsh articles about the Board or were there other factors that controlled? The court is of the opinion that even though a prima facie case of a constitutional violation was presented in the plaintiff's case in chief, the rebuttal evidence of the Board was just as persuasive that other legitimate reasons existed for favoring the Tribune over the Times.

Looking at the numbers involved during the five and a half years testified about, the Tribune received $18,338.92 in county advertising and the Times received $7,024.44. If the county advertising had been divided equally between the two publishers, each would have received approximately $12,680.00 or $2,305.00 per year. The Times did receive $1,277.00 a year on average. If the Board had as its motivation the punishment of the Times, it could have done a better job by not giving the Times any discretionary advertising. To a newspaper, $1,000.00 per year loss in gross proceeds is not much, if any, of a punishment.

The Times had been getting all of the county business before the fledgling Tribune began bidding for a share. It is clear from the record that the Times did not want the Tribune to have any county business at all. It went to court claiming the upstart Tribune was too small to meet the qualifications for printing county business. When it lost that claim, it submitted a bid to print the monthly Board proceedings for $0.00 thinking it would thereby receive the remainder of the county legal notice business. That was the second tactic by the Times to prevent the Tribune from receiving any share of the country business. When that tactic did not work and the Tribune still received some county advertising, the Times withdrew its agreement, which had already been accepted by the county, and refused to continue printing the monthly Board proceedings in accordance with its bid. The Tribune was then given the business of publishing the monthly Board proceedings. Evidently, the Times at the next bid date in 1978 again submitted a bid to publish the monthly Board proceedings at no cost and again by letter a short time later informed the Board that the Times would no longer publish the proceedings as agreed and suggested the Board have its proceedings published in the Tribune, which the Board did. These actions on the part of the Times easily have been perceived by the Board as evidence of unreliability in carrying out the publishing agreements entered into by the Times with the Board, and would in and of themselves justify a caution and perhaps a preference by the Board as to where its discretionary ads were to be published.

In the 1978 letter, the editor of the Times also accused the Board of pressuring the Times' advertisers not to advertise in the Times. The Board wrote the Times a response to that letter asking that the charges be made more specific but no reply was received from the Times.

The court is of the opinion that business experiences such as those described above would justify the Board in

placing more of its discretionary legal notices in the Tribune than in the Times, and is just as likely a reason for so doing as the claim of the plaintiff that the Tribune was favored in order to punish the Times for its criticism of the Board. Let it be remembered that the Times tried three times to prevent the Tribune from having any of the county business, once going so far as to seek an injunction in court against the Tribune. After the injunction attempt failed, the Times and the Tribune received approximately an equal share of the county business during that fiscal year; but the Times was still dissatisfied with this arrangement and refused to print any more of the county Board proceedings even though it had made a bid to do so and the bid had been accepted by the Board. From that time on, the Board allocated approximately 72% of its business to the Tribune and 28% to the Times. The court cannot look into the minds of the Supervisors and see what their intent was in allocating the ads as they did. Intent can only be inferred by one's actions. There is a possibility that the Board wished to retaliate against the Times for its editorial positions. Such a feeling certainly would not be surprising considering the circumstances, although to act out that feeling would have resulted in a constitutional deprivation; however, the court cannot say that the evidence preponderates toward that finding. The other reasons for favoring the Tribune heretofore described appear just as probable. There was also some testimony that the Board left the task of placing legal notices to the clerk of the Board. There is also convincing evidence that a majority of the Board members whom the Times complained about most vociferously had already left the Board when the Tribune was receiving the major portion of its advertising from the Board. The record is clear that the Times did not want to share the county business with the Tribune. The Times wanted it all and, when it failed to get it all, it charged the Board had violated its First Amendment rights.

Accordingly, the charge of depriving the Times of its First Amendment rights under 42 U.S.C. § 1983 will be dismissed. An order will issue accordingly.

THIS, the 8th day of March, 1988.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC81-220-NB-O

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs

v.

DOUGLAS W. JONES, *et al.*,
Defendants

ORDER

In accordance with a memorandum opinion this day issued, it is hereby ORDERED:

That the remaining claim against the DeSoto County Board of Supervisors under 42 U.S.C. § 1983 is DISMISSED; and

That this cause is DISMISSED with prejudice.

THIS, the 8th day of March, 1988.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4196

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs-Appellants,

v.

DOUGLAS W. JONES, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

June 27, 1986

David J. Cocke, Memphis, Tenn., for plaintiffs-appellants.

Nat G. Troutt, Senatobia, Miss., for Jones & DeSoto Co. Tribune.

Robert J. Kelly, Hernando, Miss., for DeSoto Co. Bd. Supervisor, Renfro, Robinson, Wallace, Riley and Lloyd.

Wm. W. Ballard, Hernando, Miss., Lawrence J. Franck, John C. Henegan, Allen W. Perry, Jackson, Miss., for Hernando Bank, Ballard & Burnett.

Before GEE, RUBIN, and GARZA, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A newspaper and two of its employees fired a broadside of antitrust, civil rights, and pendent state tort claims against a bank, a competing newspaper, and a County Board of Supervisors. After the plaintiffs had rested their case in the bench trial, the district court dismissed all of their claims. We hold that the record supports the trial court's judgment dismissing the antitrust charges, but that the factual findings on the civil rights claim are insufficient for us to determine the basis for the court's dismissal. We, therefore, vacate the judgment in part, and remand for further proceedings.

I.

Pamela McPhail Ivy was the editor of a newspaper, the *North Mississippi Times*, which was owned by North Mississippi Communications, Inc. After being displaced as the dominant newspaper in the county, allegedly as a result of the events related below, Ivy and North Mississippi Communications sued their rival, the *DeSoto County Tribune*, its owner and editor, Douglas W. Jones (the "*Tribune* defendants"); the Hernando Bank and two of its principals, Steve Ballard and Richie Burnette (the "Bank defendants"); and the DeSoto County Board of Supervisors and its members, Will Renfro, Floyd Robertson, Johnny Wallace, James Earl Riley, and Eulo Lloyd (the "Board defendants"). They alleged violations of §§ 1 and 2 of the Sherman Act, civil rights claims under 42 U.S.C. § 1983, and state-law tort claims.

The *Times*, which had its office in Hernando, Mississippi, was the first weekly newspaper in DeSoto County, Mississippi. Ivy testified that, at its peak in 1977, the *Times* had between 4,500 and 7,500 paying subscribers, mostly in the western half of the county. Several thousand additional copies were distributed free of charge. The defendants challenged these figures, and the record reflects a wide range of plausible subscription figures

based on different sources and methods of calculation. The court made no finding on this conflicting evidence. The *Tribune* had a much smaller circulation of about 700 paying subscribers, most of whom lived in the eastern half of DeSoto County in the Olive Branch area. The actual number of *Tribune* subscribers was also contested and not resolved by the court. The testimony was consistent, however, that the *Times* was substantially larger than the Tribune, which the court described as a "fledgling newspaper." Because of their geographic separation, testimony suggested that the two newspapers may not have been in direct competition until this dispute arose.

Ross Franks purchased the *Times* in 1975, hired Ivy as editor and made her a shareholder. Two years later, the Hernando Bank began a publicity campaign to announce its new name, logo, and automatic teller machines. Although the Bank advertised in the Times, Franks, who owned an interest in a competing local bank, allegedly complained to state banking authorities about an impropriety in the ads. This angered the President of Hernando Bank, Steve Ballard, who stopped all further Bank advertising in the *Times*. The Bank then contracted with the Tribune to distribute free six-month subscriptions to all bank customers beginning January 1, 1978. The Bank would pay one-half of the subscription price for each free copy and in return would receive a free quarter-page ad each week. The value of the ads covered much of the cost of the free subscriptions. As part of their agreement, the bank required the *Tribune*, which had previously been called the *Olive Branch Tribune*, to change its name to the *De Soto County Tribune*, and to provide distribution throughout the county. The Bank also loaned $60,000 to the *Tribune* for construction of a new building. No evidence suggested that the terms of the loan were more favorable than those given other borrowers.

In 1977 the *Times* began prorating its subscriptions so that all renewals would fall due the same day. Renewals

could then be solicited through annual ads in the paper, avoiding the cost of individual bills. The *Times* chose January 1, 1978 as its renewal date, and announced its decision several months in advance. The Bank's free subscription campaign began on the same date. The plaintiffs contend that this timing was intended to prevent renewals and evidences an intent to monopolize the newspaper market by driving the *Times* out of business. This is the basis for their Sherman Act claim against the Bank and *Tribune*.

The effect of the free-subscription campaign was vigorously contested. The *Times* attempted to prove that the campaign reduced the number of its paid subscribers by sixty-five percent, its advertising revenues by thirty percent, and its value as a going concern by sixty percent. The *Tribune* offered financial statements showing that the *Times*' subscription income actually increased in 1978, and other evidence that any drop in the number of paid subscriptions was attributable to factors other than the free *Tribune* campaign.

The only conclusion that can be drawn with assurance from the record is that the *Times*' financial statements, postal filings, tax returns, and estimates of paid subscribers are thoroughly inconsistent and unreliable. The trial court found "that not one scintilla of evidence was presented that any person stopped subscribing to the Plaintiff Times because of this alleged illegal agreement; nor did anyone testify they stopped advertising in the Times because of this agreement."

The *Times* also brings Sherman Act and § 1983 claims against the DeSoto County Board of Supervisors, based on a different set of facts. The county's general legal advertising, awarded by bid and paid for by the Board, had gone largely to the *Times* before 1977. In fact, the *Times* once sued to prevent the *Tribune* from being allowed to bid on these legal ads because the *Tribune* was not a "paper of general circulation." North Mississippi

contends that the Board developed ill will towards the Times because of critical editorials and news stories concerning several Board members. Allegedly in retaliation, the Board switched its advertising in large part to the *Tribune* and threatened other *Times* advertisers with a loss of county business unless they withdrew their ads. For the four years ending in September 1981, the county advertising favored the *Tribune* by almost six to one.

Soon after the Bank switched its advertising to the *Tribune*, unknown persons mailed a libelous letter to subscribers of both papers accusing Ivy of homosexual proclivities, Ross Franks of trying to gain control of the county, and the *Times* itself of trying to ruin the county.

The withdrawal of county advertising, the threats to other *Times* advertisers, and the libelous letter are the basis for the plaintiffs' charges that the Board conspired to violate the Sherman Act and retailiated against the *Times* for the exercise of its first amendment rights in violation of § 1983.

After four and one-half days of trial, the plaintiffs rested their case. All defendants moved for a dismissal or directed verdict, and the district court granted their motion. The court found that the address labels on the envelopes in which the libelous letters were mailed came from a subscriber list that the *Times* had given to the Board of Supervisors in order to qualify to bid for legal ads. The court specifically held, however, that the *Times* had failed to prove that any of the defendants had furnished the list to the author of the letter or were responsible for the mailing. The court made no finding concerning reasons for the shift in the Board's advertising or the testimony that certain Board members had threatened the *Times*' other advertisers. Without discussing the § 1983 claims, the court dismissed all of the claims against all of the defendants, stating only that the plaintiffs had failed to prove the existence of a conspiracy, or of a specific intent to monopolize, on the part of any of the defendants.

II.

The district court granted a directed verdict, "viewing the evidence in a light most favorable to the plaintiffs and giving the plaintiffs the benefit of all favorable inferences." However, when a court renders judgment in a bench trial at the close of the plaintiffs' case, the judgment is properly denominated a dismissal under Federal Rule of Civil Procedure 41(b) because "upon the facts and the law the plaintiff has shown no right to relief."[1] On appeal, we may review it as a dismissal, however, even if the district court referred to it as a directed verdict.[2]

Under Rule 41(b) the district court need not have applied as lenient a standard as it did but, as the ultimate trier of fact, it was entitled to weigh evidence, make credibility judgments, and draw inferences unfavorable to the plaintiffs.[3] Its findings of fact are shielded by Federal Rule of Civil Procedure 52(a) and must be accepted unless clearly erroneous.

The plaintiffs seize on language in the trial court's oral opinion to argue that the court applied a standard requiring "clear and convincing evidence," rather than merely a preponderance of the evidence. Although the trial court used this phrase at one point, it appears that the court was simply trying to emphasize its specific finding that no evidence whatsoever linked any of the Board defendants to the libelous letter. Reviewing the

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[1] Fed.R.Civ.P. 41(b).

[2] *See James v. DuBreuil*, 500 F.2d 155, 156 n. 6 (5th Cir.1974); *Fidelity & Cas. Co. v. Key Biscayne Bank*, 483 F.2d 438, 439 (5th Cir.1973).

[3] *Hersch v. United States*, 719 F.2d 873, 876-77 (5th Cir.1983); *Weissinger v. United States*, 423 F.2d 795, 798-99 (5th Cir.1970) (en banc); *Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1986 (5th Cir.1970); *Trask v. Susskind*, 376 F.2d 17, 19 (5th Cir.1967); 7 C. Wright & A. Miller, Federal Practice & Procedure § 2371 at 220 (1971).

opinion as a whole, it is beyond dispute that the judge applied a standard more favorable to the plaintiffs than was necessary. This error is harmless and their complaint that the trial court applied too high a standard is unfounded.

III.

We discuss the alleged violations of Sections 1 and 2 of the Sherman Act separately, noting that, while Ivy's standing as an individual to assert a Sherman Act violation is not clear, North Mississippi clearly has a right to sue.

A.

Section 1 of the Sherman Act makes illegal "every contract combination . . . or conspiracy in restraint of trade or commerce".[4] Plaintiffs argue that the free-subscription agreement between the Bank and the *Tribune* was designed to harm the *Times* and violates Section 1. They do not assert that the agreement is a *per se* violation of the antitrust laws, so its legality must be analyzed under the rule of reason.

As we stated in *Northwest Power Products v. Omark Industries*,[5] "To prove an antitrust violation under the rule of reason . . . [a plaintiff] must show the defendants' conduct adversely affected competition." The Bank defendants argue that their agreement with the *Tribune* did not adversely affect competition but increased it, establishing two competitive papers of nearly equal size in place of the *Times*' "virtual monopoly." The district court failed to make any findings concerning the anticompetitive effect of the agreement, or the relative market shares of the two papers before and after the cam-

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[4] 15 U.S.C. § 1 (1982).

[5] 576 F.2d 83, 90 (5th Cir.1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979); *see also Industrial Inv. Co. v. Mitsui*, 671 F.2d 876, 890 (5th Cir.1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983).

paign. The court did find that the *Times* failed to establish that it had lost any subscription because of the agreement, and this finding cannot be reversed unless clearly erroneous. If the *Times* lost no subscribers, then, absent a detrimental effect on competitors, the agreement could not have had any anticompetitive effect. Although the court should properly have applied the rule of reason and made a finding as to whether the agreement promoted or suppressed competition, its findings are sufficient for us to make the necessary determination. In such a case, efficiency dictates that we not order a remand needlessly.[6]

The plaintiffs' principal basis for asserting damages is their argument that the district court should have inferred that an offer of free newspapers would inevitably have led those who pay for a subscription to another paper to stop doing so. But the conclusion does not necessarily follow as a matter of logic or empirical observation. The record shows that some persons preferred the content of one, or subscribed to both, newspapers. Moreover, both papers regularly gave away thousands of free copies each year, yet were also able to sell subscriptions.

Ivy testified that it was her impression that people stopped subscribing to the *Times* because of the *Tribune's* free campaign. The plaintiffs' expert witness testified to a marked drop in subscriptions, ads, and value as a result of the double impact of the libelous letter and the free subscription campaign. The expert was unable, however, to separate the effects of the letter from those of the free campaign.

On cross-examination, the defendants exposed a number of errors in the expert's reasoning. He had attempted to set the value of the *Times* on December 31, 1977 and again one year later. In each case, however, he used

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[6] *See Pegues v. Mississippi St. Emp. Svc.*, 699 F.2d 760, 766 n. 7 (5th Cir.1983), *cert. denied*, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1984); *Continental Oil v. Cole*, 634 F.2d 188, 191 (5th Cir. 1981).

financial statements that ended with the conclusion of the *Times*' fiscal year the following May. Thus, his highest valuation of the paper, supposedly immediately before the free subscription campaign, actually was based on data that related to a time five months after the campaign had begun. The defendants presented evidence that, on a calendar year basis, subscription revenues actually increased in 1978, without a price change.

The *Times* also failed to separate the effect of its new renewal policy from the effect of the subscription campaign. Thus, the expert testified that, although renewals in January and February 1978 were the same as, or greater than, the same period in 1977, renewals fell off sharply thereafter and did not pick up again until the start of 1979. This pattern seems to be the obvious result of the *Times*' new policy that all renewals would become due in January, and it does not necessarily reflect the effect of the *Tribune's* campaign.

Evidence was adduced as to numerous personnel and financial problems that plagued the *Times* well before the events of this suit, potentially causing the paper's loss of revenue. Minutes of the *Times*' stockholders meeting, shortly after the free subscription campaign began, discuss its woes at length, but without any mention of the *Tribune's* or the Bank's conduct. The financial statements and subscription records of the *Times* were rife with inaccuracies. For example, the *Times* generally failed to segregate subscription revenue from other income, or to note on its subscriber list which subscriptions were paid and which were free or expired. We certainly cannot say, on the record before us, that the trial court was clearly erroneous in finding no evidence that the free subscription campaign injured the *Times* or affected its competitive position.[7]

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[7] *Cf. Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 388 (8th Cir.), *cert. denied*, 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d 63 (1974).

Appellants also assert a Section 1 claim against the Board for an alleged conspiracy with the *Tribune*. The district court found no evidence of any agreement or conspiracy between these two defendants. The record adequately supports the judge's finding. We therefore affirm his dismissal of the Section 1 claim against all defendants.

B.

Section 2 of the Sherman Act condemns three actions: monopolization, attempt to monopolize, and conspiracy to monopolize.[8] In the district court the only Section 2 claims asserted by the plaintiffs were attempt and conspiracy to monopolize. We therefore consider only these two charges.

To establish an illegal attempt to monopolize, a plaintiff must prove that the defendant (1) had the specific intent to monopolize, (2) took overt acts in furtherance of a scheme to monopolize, and (3) had a dangerous probability of success.[9] A conspiracy to monopolize can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce.[10]

A specific intent to monopolize is an essential element of each of the two offenses. The district court expressly

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[8] 15 U.S.C. § 2 (1982).

[9] *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990 (5th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *Dimmitt Agri Indus. Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 525 (5th Cir.1982), *cert. denied*, 460 U.S. 1080, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983).

[10] *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed.2d 575 (1946); *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir.1983).

found that neither the Bank defendants nor the *Tribune* defendants had specific intent to monopolize. In doing so, the district court credited the testimony of the Bank defendants and the *Tribune* defendants that the free-subscription campaign was conducted for legitimate business reasons. That conclusion was for the factfinder, based on his assessment of the credibility of the witnesses.

Plaintiffs respond that the bank distributed free subscriptions only to its depositors and that there could not have been any sound reason to advertise to existing clients. The Bank, however, described the objective of its publicity campaign as announcing its new corporate image and automatic cash machines. This was a plausible reason to communicate with those who were already customers. Whether other, more cost-effective, methods were available, such as enclosures in monthly bank statements, is a factor that may be considered, but is not determinative of the Bank's intent.

The plaintiffs argue that two cases, *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*[11] *and Morning Pioneer, Inc. v. Bismarck Tribune Co.*,[12] compel a finding that the blanketing of free newspapers establishes a specific intent to monopolize. Those cases hold only that blanketing, combined with other indications, will support an inference of intent to monopolize. They do not hold that blanketing, in and of itself, necessarily establishes the requisite intent. Moreover, both cases involved blanketing by a dominant newspaper in an attempt to drive its lesser competitors out of business. The distribution of free newspapers might, in such cases, support an inference of monopolistic intent while the same conduct here by a "fledgling newspaper" that seeks to enter a new geographic market would not require the same con-

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[11] 601 F.2d 48 (2nd Cir.1979).

[12] 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d 63 (1974).

clusion. Accordingly, the district court finding that the plaintiffs did not prove intent to monopolize is not clearly erroneous.

This finding makes it unnecessary for us to consider whether North Mississippi Communications established any of the other elements of either the attempt or the conspiracy claim. Without proof of intent, neither Section 2 claim can succeed. We therefore affirm the trial court's dismissal of these claims against the Bank and *Tribune* defendants. The court's finding that the Board did not conspire with the *Tribune* or the Bank requires us also to affirm dismissal of the Section 2 claim against the Board defendants.

IV

The plaintiffs proffered the testimony of Mrs. Ivy about what Ron Moody, the managing editor of the *Tribune*, told her that Steve Ballard, the President of Hernando Bank, had told him. Ballard supposedly told Moody that the *Times* would be out of business in three weeks, given the free subscription campaign and the defamatory letter. The plaintiff proffered the statement as evidence of the Bank defendants' specific intent to monopolize.

The district court sustained a hearsay objection, and we find no abuse of discretion in this ruling.[13] Moody's statement does not so clearly demonstrate an illegal conspiracy as to be against his pecuniary or penal interest as the plaintiffs contend.[14]

The plaintiffs' second argument is that Moody was "partially unavailable" and that the testimony was therefore admissible under Federal Rule of Evidence 804(a)(3) because, although he testified at trial, he stated that

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[13] *See, e.g., Jon-T-Chem., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir.1983).

[14] Fed.R.Evid. 804(b)(3); *See Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1345 (D.Minn.1985); *United States v. Alvarez*, 584 F.2d 694, 699-702 (5th Cir.1978).

"the specific dialogue of this conversation has faded with the years." This rule makes hearsay testimony admissible if the witness testifies that he has no memory of the events to which his hearsay statements relate.[15] Moody did, however, remember the general subject matter discussed, and his lack of memory of the details is not sufficient to make the testimony admissible.[16] *United States v. Davis*,[17] on which appellants rely, was decided on the different ground of 804(b)(1), which permits prior testimony, and is of no help to them here.

V.

Asserting a claim for violation of their constitutional right to free speech, arising under 42 U.S.C. § 1983,[18] the plaintiffs contend that the Board defendants retaliated against them for publishing editorials and news stories critical of the Board and its members. They adduced testimony that, because the *Times* had exercised its first amendment rights, the Board defendants deprived the *Times* of valuable legal advertisements and threatened its other commercial advertisers. The plaintiffs testified at length regarding direct confrontations with Board members who stated or implied that the Board was attempting to punish the newspaper for its editorials.

In *Perry v. Sindermann*,[19] the Supreme Court held that government "may not deny a benefit to a person on a

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[15] S. Saltsburg & K. Redden, Federal Rules of Evidence Manual 650 (3d ed. 1982).

[16] Fed.R.Evid. 804(a)(3). *Cf. Walden v. Sears Roebuck & Co.*, 654 F.2d 443, 446 (5th Cir.1981); *United States v. Amaya*, 533 F.2d 188 (5th Cir.1978), *cert. denied*, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977).

[17] 551 F.2d 233, 235 (8th Cir.), *cert. denied*, 431 U.S. 923, 97 S.Ct. 2197, 53 L.E.2d 237 (1977).

[18] 42 U.S.C. § 1983 (1982).

[19] 408 U.S. 593, 597, 92 S.Ct. 2694, 1697, 33 L.Ed.2d 570 (1972).

basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech." Although the *Times* may have had no "right" to receive certain legal advertising from the County Board of Supervisors, it would violate the Constitution for the Board to withhold public patronage, in the form of its advertising, from the *Times* in retaliation for that newspaper's exercise of first amendment rights, or, in similar reprisal to threaten commercial advertisers with a loss of county business should they continue to advertise in the *Times*. To permit such actions would "allow the government to 'produce a result which [it] could not command directly,' " [20] that is, denying the *Times* business in retaliation for its protected speech.

The Board does not deny that it is an official body and acts under color of state law. The *Times*' allegations were sufficient, therefore, to support a § 1983 claim. The court found no proof of any link between the Board or its members and the libelous letter. This finding is not clearly erroneous. The letter, therefore, cannot support the Times' § 1983 claim. The district court's only other finding was that withholding the county's legal advertisements did not threaten to put the *Times* out of business. While perhaps relevant to the antitrust claim, this finding does not dispatch the § 1983 claim.

We must, therefore, remand the § 1983 claim for further findings. On remand, the court should determine whether, on the record before it, the § 1983 claim must be dismissed because of an absence of proof that (1) the Board denied some or all of its legal advertising to the *Times* in retaliation for the *Times*' critical news stories and editorials; (2) any Board member threatened the *Times*' advertisers for the same reason; and (3) these actions damaged the *Times*. If the district court determines that the record suffices to prevent the dismissal of

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[20] *Id.* at 597, 92 S.Ct. at 2697 (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

the § 1983 claims, the court shall proceed with the further trial of the case.

For the foregoing reasons, we AFFIRM the dismissal of the Section 1 and 2 antitrust claims against all defendants, but we VACATE that part of the judgment dismissing the § 1983 claim and REMAND the case for findings of fact concerning that claim. The plaintiffs do not appeal, and we therefore do not address, the district court judgment dismissing their pendent state-law claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC81-220-NB-D

NORTH MISSISSIPPI COMMUNICATIONS, INC., *et al.*,
Plaintiffs

v.

DOUGLAS W. JONES, *et al.*,
Defendants

ORDER

The court began hearing the above styled and numbered cause on January 30, 1985. At the conclusion of the plaintiffs' evidence, all of the defendants in this cause moved for a directed verdict. After hearing the arguments of counsel and considering the authorities cited, the court determined that, viewing the evidence in a light most favorable to the plaintiffs and giving to the plaintiffs the benefit of all favorable inferences reasonably drawn from the evidence, the plaintiffs had failed to establish a prima facie case against any of the defendants. In a bench opinion rendered February 11, 1985, the court enumerated its findings supporting this determination. In conformity with its bench opinion the court hereby finds that the respective motions of the defendants for a directed verdict are well taken and holds that the cause against these defendants is hereby finally dismissed.

SO ORDERED this, the 14th day of February, 1985.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1601

NORTH MISSISSIPPI COMMUNICATIONS, INC.
and PAMELA MCPHAIL IVY,
Plaintiffs-Appellants,

versus

DOUGLAS W. JONES,
Defendant,

DESOTO COUNTY BOARD OF SUPERVISORS,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 1-28-92, 5 Cir., 198—, —— F.2d ——)

[Filed Mar. 30, 1992]

Before BROWN, KING and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the

panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: . . . .

/s/ [Illegible]
United States Circuit Judge

(2)

No. 92-54

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THE DESOTO COUNTY BOARD OF SUPERVISORS, WILL RENFRO, FLOYD ROBERTSON, JOHNNY WALLACE, JAMES EARL RILEY AND EULO LOYD,

Petitioners,

v.

NORTH MISSISSIPPI COMMUNICATIONS, INC., PAMELA McPHAIL IVY AND CHARLES M. IVY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the panel opinion of the Fifth Circuit Court of Appeals, which failed to take into account cases involving political patronage in the context of an independent contractor, and which, as a consequence, expands *Elrod v. Burns,* 427 U.S. 347 (1976), *Branti v. Finkel,* 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois,* 110 S.Ct. 2729 (1990) beyond their express limitation to government employees and thereby conflicts with every other circuit which has addressed the issue, should be vacated and the judgment of the district court affirmed.

2. Whether the law of the case doctrine should bar consideration of this purely legal issue where application of the doctrine would result in manifest injustice and clear error.

PARTIES TO THE PROCEEDING

All parties to this proceeding in the Fifth Circuit Court of Appeals whose judgment is sought to be reviewed are:

Petitioners:

The DeSoto County Board of Supervisors
Will Renfro
Floyd Robertson
Johnny Wallace
James Earl Riley
Eulo Loyd

Respondents:

North Mississippi Communications, Inc.
Pamela McPhail Ivy

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JURISDICTION

The Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) for review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 28, 1992 (*NMCI IV*). However, the substantive question presented was not an issue in *NMCI IV*, neither the district court nor Fifth Circuit have ever analyzed this case in the context of the question presented, and the issue was never raised or suggested by the Petitioners until the filing of their Suggestion for Rehearing *en banc*, which was denied on March 29, 1992. Since this case has been remanded to the district court and may travel its well-worn path to the Fifth Circuit again, Petitioners may yet have another opportunity to present the issue to the Fifth Circuit, after which review by this Court may or may not be more appropriate or even requested. Since the Fifth Circuit has not rendered a judgment on the question presented, the instant petition should be considered under Supreme Court Rule 11, and denied since Petitioners have made no showing that this case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

STATEMENT OF THE CASE

This is a case under 42 U.S.C. § 1983 against the DeSoto County Board of Supervisors individually and collectively as the official governing body of DeSoto County, Mississippi. The Respondents are the former publisher of the *North Mississippi Times* and its editor,

Pam Ivy, who was courageous enough to print articles and editorials critical of the corruption which existed within the Board of Supervisors of DeSoto County. Pam Ivy was an idealist who believed that it was the duty of the press, protected by the First Amendment, to report to the citizens of DeSoto County the conduct of their elected officials so that they might be better informed on matters of public concern. At the same time, and for many years before, the *Times* also published minutes of proceedings of the Board and legal notices, bid announcements, and advertisements of various departments of county government including the Board. As the lower courts found, after the critical articles and editorials began to appear in the *Times*, there was a dramatic shift of Board directed ads and publications away from the *Times* to the *Olive Branch Tribune*, a smaller newspaper headquartered in another county. Indeed, the Fifth Circuit has held, and it is now the law of the case, that the Respondents proved that the Board's desire to retaliate against the *Times* for its critical articles and editorials was a motivating factor in their decisions to shift ads from the *Times* to the *Tribune*. *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 655 (5th Cir. 1992).

The compensatory damages sought by Respondents are incidental to the real essence of their complaint against the Board: that the government may not use the award of public benefits, contracts, or business as a device to influence the character of reporting by the press on the government's activities, *e.g.* as a reward for those who "toe the line" and a punishment for those who do not.

There has never been any allegation or proof presented in this case that the Board's shift of ads from the *Times* to the *Tribune* was the result of traditional political favoritism. There is no proof in the record of the political affiliations, if any, of any of the parties involved in this case. Nor is there any evidence pertaining to the Respondents' election endorsement of any of the Petitioners or their opponents. This case was tried and thrice reviewed solely on the basis that the Board withheld county business in order to manipulate the *Times'* editorial policies and to retaliate for the *Times'* exercise of its First Amendment rights. For example, there was testimony that one of the Petitioners told Ms. Ivy that she would receive her share of ads if she would just "straighten up". *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064, 1067 (5th Cir. 1989). This is simply not a case dealing with partisan political patronage.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS IN *NMCI IV* DID NOT EXTEND *ELROD/BRANTI/RUTAN* AND IS NOT IN CONFLICT WITH CASES REGARDING INDEPENDENT CONTRACTORS IN A POLITICAL PATRONAGE CONTEXT.

In order to create justification for immediate review by this Court of the Fifth Circuit's denial of rehearing *en banc*, the Petitioners have seized upon the Fifth Circuit's use of the term "political patronage" in *NMCI II* in an attempt to recharacterize this case as one which should be

governed by *Elrod/Branti/Rutan* and their progeny. However, given the facts and theories presented in the instant case, *Elrod/Branti* et al. are not controlling and are not contrary to the precedent relied upon by the Fifth Circuit here, *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In *Perry*, which is cited in *Elrod, Branti*, and *Rutan*, this Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech." 408 U.S. at 597, 92 S.Ct. at 2697. This is the quintessential case for a strict application of the *Perry* principle: a direct attempt by the government to control the information available to its citizens by economic duress exerted against a small and vulnerable newspaper and its editor.

The *Elrod/Branti* cases present a different scenario. In each of those cases the courts concluded that the governmental action was based solely or primarily on partisan political grounds. For example, in *Elrod*, the petitioners "were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation" with the Cook County, Illinois Democratic Party. *Elrod v. Burns*, 427 U.S. 347, 349, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976). In *Branti*, the respondents were discharged "solely because of their political beliefs". The Republican respondents, who had been appointed by a Republican, were about to be terminated by the recently appointed county public defender, a Democrat. *Branti v. Finkel*, 445 U.S. 507, 508, 63 L.Ed.2d 574, 577, 100 S.Ct. 1287 (1980). In *Rutan*, the governor of Illinois was alleged to have operated "a political patronage system to limit state employment and beneficial employment-related decisions to

those whose are supported by the Republican Party." *Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52, 61, 110 S.Ct. 2729 (1990). In each of these cases the Court was called upon to balance the freedoms and protections afforded by the First Amendment against the state's interest in maintaining the centuries-old practice of political patronage or favoritism, sometimes pejoratively referred to as the "spoils system".

The holding of the Fifth Circuit in *NMCI IV* is not contrary to any of the seven opinions of the four circuits cited by Petitioners. In the leading circuit case, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044, 79 L.Ed.2d 175, 104 S.Ct. 712 (1984), the issue was whether the City of Springfield, Illinois could use political criteria in the award of a contract to install and maintain benches along city streets. *LaFalce* was a prototypical political patronage case since the allegation was that the plaintiff was not a political supporter of the mayor as were the operators of the company to whom the contract was awarded. The Seventh Circuit characterized the governmental conduct as the "practice of favoring political supporters in awarding contracts for public projects . . . ." *Id.* at 293. Following *LaFalce*, the Seventh Circuit in *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 L.Ed.2d 97, 111 S.Ct. 129 (1990), denied relief to a security firm that was denied a city contract because, *inter alia*, the firm had not supported the election campaign of Mayor Washington. In the latest Seventh Circuit case, *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S.Ct. 604 (1991), the

City of Milwaukee refused to extend the plaintiff's parking lot leases, which would have been renewed had the plaintiff not lobbied against a state statute relating the operation of city lots which was supported by the city. While noting that this Court's opinion in *Rutan* "has cast doubt on the validity of the reasoning" of *LaFalce* and *Triad*, 938 F.2d at 709, the Seventh Circuit adhered to those cases holding that the First Amendment does not protect "independent contractors whose bids for public contracts are rejected on the basis of their political views" and that "political favoritism in the awarding of public contracts is not actionable". *Id.* at 709 and 710, respectively.

Downtown Auto Parks is especially noteworthy in the distinction that it draws between political patronage cases and one where an independent contractor was discharged solely because of his speech related decision not to cooperate in a police investigation. *Id.* at 710. *See, Lipinski v. Dietrich*, 78 F.Supp. 235 (N.D. Ind. 1984). *Lipinski* was a post-*LaFalce* decision of a district court in the Seventh Circuit finding that an independent contractor could maintain a First Amendment action for the removal of his name from a list of towing operators approved by the police. The district court held that the case fell within the reasoning of *Elrod* and *Branti* in that the plaintiff was discharged from the towing list solely because of his decision not to cooperate with a police investigation, a right protected by the First Amendment. *Id.* at 240. Under the Petitioner's argument, *Lipinski*, like *NMCI IV*, would be directly contrary to the *Elrod/Branti* progeny since those cases interpreted *Elrod/Branti* as a virtual mandate

that only government employees are protected from victimization by the spoils system. However, the Seventh Circuit in *Downtown Auto Parks* instead distinguished *Lipinski* on the grounds that Lipinski was discharged solely because of speech-related disagreements with the police. The instant case is more similar to *Lipinski* than the *Elrod/Branti* progeny in that it is solely a speech-related case in which partisan political favoritism is not implicated. Therefore, if *Lipinski* is distinguishable from *Downtown Auto Parks, et al.*, so also is *NMCI IV*.

Although the Sixth Circuit case of *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *modified on other grounds*, 924 F.2d 627 (*en banc*), *cert. denied*, ___ U.S. ___, 115 L.Ed.2d 1054, 111 S.Ct. 2889 (1991), presented another set of facts where the complained of conduct was based solely on political affiliation, that case does not belong in this group, and is not contrary to *NMCI IV*, because the Sixth Circuit did not reach the issue for which it is cited by Petitioners. The issue in that case was, for purposes of qualified immunity, whether in 1983 "it was 'clearly established' that the refusal of public officials to grant a public contract to the lowest bidder solely because of political affiliation violated Lundblad's first amendment rights". In holding that such was not clearly established in 1983, the Sixth Circuit stated: "We emphasize that we do not reach the underlying issue of whether *Elrod* and *Branti* should be extended to situations involving independent contractors". *Id.* at 1102.

The Third Circuit's contribution to this line, *Horn v. Kean*, 796 F.2d 668 (3rd. Cir. 1986), is another classic political patronage case where the governmental conduct was based solely on political party affiliation. In that case

state motor vehicle agents who happened to be Democrats were replaced by a newly elected Republican governor. Likewise, in the Eighth Circuit cases of *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982) and *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982), the sole grounds alleged for the governmental conduct was the plaintiffs' lack of favored political affiliation.

As each of the foregoing cases recognized, *Elrod*, *Branti*, and *Rutan* were self-limited to cases involving public employees, as well they should have been since the petitioners in those cases *were* public employees and the Court decides cases on the narrowest grounds possible. Likewise, the facts of those cases were that the constitutionally infirm governmental conduct was based solely or predominantly on partisan political grounds. Neither this Court nor any of the circuits whose cases are cited by Petitioners has ruled that independent contractors are not entitled to First Amendment protection against governmental retaliation based solely on the government's desire to restrain, manipulate, or punish one for its exercise of free speech. Reliance of the Fifth Circuit on *Perry v. Sindermann* in this case is not in conflict with any decision of any other circuit or this Court. The alleged contrary opinions are simply not on the same matter, and the Court should not grant *certiorari* to review this case to decide an issue not squarely presented.

II. THE LAW OF THE CASE DOCTRINE

Because the Petitioners petition for *certiorari* is virtually a verbatim restatement of their Suggestion for Rehearing *en banc*, it includes the argument made to the

Fifth Circuit to consider their newly raised issue as an exception to the law of the case doctrine. While that argument was necessary in the Fifth Circuit, it is not here since the law of the case does not bind this Court in reviewing decisions on writ of *certiorari*. *Christianson v. Colt Industries*, 486 U.S. 800, 817, 100 L.Ed.2d 811, 831, 108 S.Ct. 2166 (1988). However, although this Court has the authority to review any aspect of the decisions below, it does not follow that that discretion should be exercised in each and every case. At some point in litigation the interest of finality must become paramount; there must be an outer limitation on the freedom of a party to force the relitigation of a case by changing its legal theories or raising new issues. This case had been pending for ten years before Petitioners ever raised the political patronage issue, which is, of course, an affirmative defense. Four and one-half years and two appeals passed after the Fifth Circuit cited *Perry v. Sindermann* in *NMCI I* before Petitioners challenged that precedent. *Perry v. Sindermann* is and should remain the law of this case.

CONCLUSION

The Petitioners retaliated against the Respondents to control the exercise of their First Amendment rights to free speech and free press. Petitioners have recharacterized their behavior in this Petition as the innocent exercise of political patronage in order to create a conflict among the circuits where none exits. This defense was never raised at trial or at any of the three appeals to the Fifth Circuit and was raised for the first time in Petitioners' Suggestion for Rehearing *en banc*, summarily

denied by the Fifth Circuit. The Petitioners have made no showing that their most recent defense is of such imperative public importance to justify this Court's deviation from normal appellate practice and the Petition should therefore be denied.

Respectfully submitted,
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